HEARING TO REVIEW THE DEFINITION OF THE *WATERS OF THE UNITED STATES* PROPOSED RULE AND THE IMPACT ON RURAL AMERICA

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSERVATION AND FORESTRY

OF THE

COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

MARCH 17, 2015

Serial No. 114–4

Printed for the use of the Committee on Agriculture
agriculture.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

93–963 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON AGRICULTURE

K. MICHAEL CONAWAY, Texas, *Chairman*

RANDY NEUGEBAUER, Texas, *Vice Chairman*
BOB GOODLATTE, Virginia
FRANK D. LUCAS, Oklahoma
STEVE KING, Iowa
MIKE ROGERS, Alabama
GLENN THOMPSON, Pennsylvania
BOB GIBBS, Ohio
AUSTIN SCOTT, Georgia
ERIC A. "RICK" CRAWFORD, Arkansas
SCOTT DESJARLAIS, Tennessee
CHRISTOPHER P. GIBSON, New York
VICKY HARTZLER, Missouri
DAN BENISHEK, Michigan
JEFF DENHAM, California
DOUG LAMALFA, California
RODNEY DAVIS, Illinois
TED S. YOHO, Florida
JACKIE WALORSKI, Indiana
RICK W. ALLEN, Georgia
MIKE BOST, Illinois
DAVID ROUZER, North Carolina
RALPH LEE ABRAHAM, Louisiana
TOM EMMER, Minnesota
JOHN R. MOOLENAAR, Michigan
DAN NEWHOUSE, Washington

COLLIN C. PETERSON, Minnesota, *Ranking Minority Member*
DAVID SCOTT, Georgia
JIM COSTA, California
TIMOTHY J. WALZ, Minnesota
MARCIA L. FUDGE, Ohio
JAMES P. MCGOVERN, Massachusetts
SUZAN K. DELBENE, Washington
FILEMON VELA, Texas
MICHELLE LUJAN GRISHAM, New Mexico
ANN M. KUSTER, New Hampshire
RICHARD M. NOLAN, Minnesota
CHERI BUSTOS, Illinois
SEAN PATRICK MALONEY, New York
ANN KIRKPATRICK, Arizona
PETE AGUILAR, California
STACEY E. PLASKETT, Virgin Islands
ALMA S. ADAMS, North Carolina
GWEN GRAHAM, Florida
BRAD ASHFORD, Nebraska

SCOTT C. GRAVES, *Staff Director*
ROBERT L. LAREW, *Minority Staff Director*

SUBCOMMITTEE ON CONSERVATION AND FORESTRY

GLENN THOMPSON, Pennsylvania, *Chairman*

FRANK D. LUCAS, Oklahoma
STEVE KING, Iowa
SCOTT DESJARLAIS, Tennessee
CHRISTOPHER P. GIBSON, New York
DAN BENISHEK, Michigan
RICK W. ALLEN, Georgia
MIKE BOST, Illinois

MICHELLE LUJAN GRISHAM, New Mexico, *Ranking Minority Member*
ANN M. KUSTER, New Hampshire
RICHARD M. NOLAN, Minnesota
SUZAN K. DELBENE, Washington
ANN KIRKPATRICK, Arizona

CONTENTS

WITNESSES

Page

SUBMITTED MATERIAL

HEARING TO REVIEW THE DEFINITION OF THE *WATERS OF THE UNITED STATES* PROPOSED RULE AND THE IMPACT ON RURAL AMERICA

TUESDAY, MARCH 17, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSERVATION AND FORESTRY,
COMMITTEE ON AGRICULTURE,
Washington, D.C.

The Subcommittee met, pursuant to call, at 2:17 p.m., in Room 1300 of the Longworth House Office Building, Hon. Glenn Thompson [Chairman of the Subcommittee] presiding.

Members present: Representatives Thompson, Lucas, DesJarlais, Gibson, Benishek, Bost, Goodlatte, Conaway (*ex officio*), Gibbs, Lujan Grisham, Nolan, DelBene, and Kirkpatrick.

Staff present: Carly Reedholm, Jessica Carter, John Goldberg, Josh Maxwell, Matt Schertz, Patricia Straughn, Skylar Sowder, John Konya, Anne Simmons, Evan Jurkovich, and Nicole Scott.

OPENING STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA

The CHAIRMAN. Good afternoon. This hearing of the Subcommittee on Conservation and Forestry to review the definition of the *waters of the United States* proposed rule and the impact on rural America, will come to order.

Let me begin with my opening statement—well, first of all, I want to welcome everybody. I appreciate all the Members being here. I appreciate your patience, we are a little bit behind with Floor business, but we are here now and ready to get to work. Thank you to all the witnesses for being here. I want to welcome you to today's hearing to review the definition of the *waters of the United States* proposed rule and its impact on rural America.

The Clean Water Act created a historic partnership between the Federal Government and the states to protect our nation's navigable waterways. However, since the law's inception, the EPA and the Army Corps of Engineers have on many occasions ignored the original intent of Congress and have instead promoted the concept of statutory ambiguity as a justification for slowly and continually extending their jurisdictional reach.

As a result, the Supreme Court has ruled that the EPA has unlawfully expanded its authority, compelling the high court to recommend that the government's authority must be more clearly defined. The Obama Administration has taken it upon itself to rede-

fine their authority over jurisdictional waters, also known as navigable waters. When Congress rejected legislation that would expand the Federal scope and jurisdiction over regulated waterways, the EPA attempted to circumvent Congress and achieve overreaching legislative goals through agency guidance. When Congressional and public outcry called for a formal rulemaking process, the Obama Administration developed a proposal to expand their jurisdiction, ignoring input from the states and stakeholders.

Over the past year, the Obama Administration has contended that the proposed rule defining the *waters of the United States* would make no substantial changes to traditional jurisdictional waters, and has continually assured the agriculture sector that, not only will current exemptions stay the same, but that the rule only serves to provide more clarity.

If clarity, certainty, and better establishing reasonable jurisdictional limits was the intent of the rule, this proposal completely misses the mark. We continually hear testimony that the proposal will allow the EPA the ability to regulate essentially any body of water, such as a farm pond or even a ditch, even if that farm pond or ditch is dry during much of the year.

Today we will hear a broad range of concerns from across rural America including the legal complications that agricultural producers and foresters are certain to face, the costs to states and counties to comply with this unwarranted expansion of jurisdiction, and obstacles to building rural infrastructure.

Now, while the Committee does not have jurisdiction over the Clean Water Act, this proposal drafted under the authority of that Act will have dire and significant consequences for rural America. It is therefore this Committee's responsibility to review the proposal and highlight the potential negative consequences if the rule is finalized in its current form.

Now, where the Committee does have jurisdiction, we will continue to engage. One example is the negative consequence this proposal will have regarding registered pesticide applications. As we have heard, an uninformed court decision in 2009 subjected registered pesticide applications in or near *waters of the United States* to a duplicative permitting requirement under section 402 of the Clean Water Act.

As the Administration presses forward with their unprecedented expansion of jurisdictional waters, the implications for farmers, water resource boards and mosquito control districts will be severe. This Committee and this House have made numerous attempts to address this problem and we will once again markup that legislation 2 days from now.

Rural America's voice cannot be ignored. As such, the Committee would urge EPA Administrator McCarthy, Assistant Secretary Darcy of the Army Corps of Engineers, and USDA Secretary Vilsack to pay close attention to today's hearings so they can take note of, firsthand, the concern their actions have created in the countryside. The Committee may call on them in the future to address specific issues and concerns raised in today's hearings.

Now, let me be clear. There is a need for more certainty and clarity of the reach of the Clean Water Act. However, this rule will provide neither. After today's hearing, I hope the Administration will

take action by pulling the proposed rule, and start over by working with the states and taking into consideration the concerns that they have heard from stakeholders. Or, if the EPA and Corps proceed and push this rule through, I call on the Administration to repropose the rule for a new round of public comment. This will allow the states and the stakeholders a chance to see the significant changes EPA and the Corps claim they have made since the first comment period closed.

Now, I thank the witnesses for taking their time to be here today, which will be spread over two panels of testimony. I look forward to hearing from everyone here today.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA

Good morning, and welcome to today's hearing to review the definition of the "*waters of the United States*" proposed rule and its impact on rural America.

The Clean Water Act created a historic partnership between the Federal Government and the states to protect our nation's navigable waterways. However, since the law's inception, the EPA and the Army Corps of Engineers have on many occasions ignored the original intent of Congress and have instead promoted the concept of statutory ambiguity as a justification for slowly and continually extending their jurisdictional reach.

As a result, the Supreme Court has ruled that the EPA has unlawfully expanded its authority, compelling the high court to recommend that the government's authority must be more clearly defined.

The Obama Administration has taken it upon itself to redefine their authority over jurisdictional waters, also known as "navigable waters". When Congress rejected legislation that would expand the Federal scope and jurisdiction over regulated waterways, the EPA attempted to circumvent Congress and achieve overreaching legislative goals through agency guidance.

When Congressional and public outcry called for a formal rule-making process, the Obama Administration developed a proposal to expand their jurisdiction, ignoring input from the states and stakeholders.

Over the past year, the Obama Administration has contended that the proposed rule defining the "*waters of the United States*" will make no substantial changes to traditional jurisdictional waters and has continually assured the agriculture sector that, not only will current exemptions stay the same, but that the rule only serves to provide more clarity.

If clarity, certainty, and better establishing reasonable jurisdictional limits was the intent of the rule, this proposal completely misses the mark.

We continually hear testimony that the proposal will allow the EPA the ability to regulate essentially any body of water, such as a farm pond or even a ditch—even if that farm pond or ditch is dry during much of the year.

Today we will hear a broad range of concerns from across rural America including: (1) the legal complications that agricultural producers and foresters are certain to face; (2) the costs to states and counties to comply with this unwarranted expansion of jurisdiction; (3) and obstacles to building rural infrastructure.

While the Committee does not have jurisdiction over the Clean Water Act, this proposal drafted under the authority of that Act will have dire and significant consequences for rural America. It is therefore this Committee's responsibility to review the proposal and highlight the potential negative consequences if the rule is finalized in its current form.

Where the Committee does have jurisdiction, we will continue to engage. One example is the negative consequence this proposal will have regarding registered pesticide applications. As we have heard, an uninformed court decision in 2009 subjected registered pesticide applications in or near *waters of the United States* to a duplicative permitting requirement under section 402 of the Clean Water Act.

As the Administration presses forward with their unprecedented expansion of jurisdictional waters, the implications for farmers, water resource boards and mosquito control districts will be severe. This Committee and this House have made numerous attempts to address this problem and we will once again markup that legislation 2 days from now.

Rural America's voice cannot be ignored. As such, the Committee would urge EPA Administrator McCarthy, Assistant Secretary Darcy of the Army Corps of Engineers, and USDA Secretary Vilsack to pay close attention to today's hearing so they can take note of, first hand, the concern their actions have created in the countryside. The Committee may call on them in the future to address specific issues and concerns raised in today's hearing.

Let me be clear—there is a need for more certainty and clarity of the reach of the Clean Water Act. However, this rule will provide neither. After today's hearing, I hope the Administration will take action by pulling the proposed rule, and start over by working with the states and taking into consideration the concerns they have heard from stakeholders. Or, if the EPA and Corps proceed and push this rule through, I call on the Administration to re-propose the rule for a new round of public comment. This will allow the states and stakeholders a chance to see the significant changes EPA and the Corps claim they have made since the first comment period closed.

I thank the witnesses for taking time to be here today, which will be spread over two panels of testimony. I look forward to hearing from everyone here today—and yield to the Ranking Member Rep. Lujan Grisham.

The CHAIRMAN. I am pleased to yield to the Ranking Member of the Subcommittee, Representative Lujan Grisham, for her opening statement.

OPENING STATEMENT OF HON. MICHELLE LUJAN GRISHAM, A REPRESENTATIVE IN CONGRESS FROM NEW MEXICO

Ms. LUJAN GRISHAM. Thank you, Mr. Chairman. And as you can see clearly, my legs aren't nearly as long as the Chairman's, so it took me longer to get to the Committee from voting, so I apologize.

The CHAIRMAN. We will take shorter steps.

Mr. LUJAN GRISHAM. That seems like a great compromise. I appreciate that. And I am really excited, Mr. Chairman, about having this first hearing in this Subcommittee of the Agriculture Committee, and I am really honored to be the Ranking Member. I appreciate your leadership in holding this hearing, and I am very grateful to have the panel here. Particularly, I am going to give a shout out to a fellow New Mexican, Jeff Witte, who is the Secretary of our Department of Agriculture. He and I have worked in state government since the mid-1990s, I think. Actually, I think I was there before you, so I am your elder. I am really honored that he is here. He is someone who has great respect in New Mexico. I know the other panelists in their own rights are going to give us great testimony, but I want to thank you for your expertise, Jeff, and I want to thank you for making the trip. I appreciate the work that you are doing on behalf of our agricultural community and all New Mexicans. So thank you very much.

In today's hearing, we are going to discuss the pending rule to define *waters of the United States*. Now, as a Representative from a state that is currently in a historic drought, projected to become a mega drought over the next couple of decades, I understand more than ever the importance of protecting this scarce resource. It is essential for farmers, ranchers, municipalities, consumers, fish and wildlife. Policymakers have an obligation to work together to ensure that communities have access to safe drinking water, agricultural producers have adequate water resources, and local economies are not adversely affected by vague and unclear policies and regulations.

EPA has stated that the rule is supposed to provide greater clarity on what types of waters are covered under the Clean Water Act,

including intermittent and ephemeral rivers. I appreciate the importance of protecting these types of tributaries. Ninety-five percent of New Mexico's linear streams are actually considered intermittent, and over 280,000 people in New Mexico receive drinking water from public drinking water systems that, at least in part, rely on these types of streams and rivers. Although, I too agree with the EPA's intent, as stated by the Chairman that they have an obligation, I have an expectation that they fulfill that obligation to protect clean water. A one-size-fits-all approach can often lead to unintended consequences.

Today's hearing will give us the opportunity to identify those unintended consequences and look for areas for improvement and common ground how we can move forward. I have heard concerns from many stakeholders about how the pending rule could impact their way of living, their ability to regulate and protect clean water, and their efforts to spur economic development. These stakeholders agree that the rule must provide more clarity regarding definitions and jurisdictional issues.

I hope our witnesses will be able to provide some specific examples of their concerns, and better yet, constructive suggestions for areas of improvement.

In closing, I again want to welcome today's witnesses, including Secretary Witte, and I look forward to everyone's testimony.

Again, thank you, Mr. Chairman, for the opportunity, and I yield back.

The CHAIRMAN. I thank the gentlelady.

I now recognize the full Agriculture Committee Chairman, Chairman Conaway, for an opening statement.

OPENING STATEMENT OF HON. K. MICHAEL CONAWAY, A REPRESENTATIVE IN CONGRESS FROM TEXAS

Mr. CONAWAY. Thank you, Mr. Chairman, and I ask unanimous consent to submit my opening statement for the record. But I would like to brag on you and the Ranking Member. I have great confidence in you both. This is a terrific topic, a timely topic for you to have your very first Subcommittee hearing under the 114th Congress, and you are going to be off to a great start. You have a good panel of witnesses here today, and I want to thank all of you for the trek that you made to come to D.C. to share with us your wisdom about these issues. And so I am looking forward to, G.T., your leadership and, Michelle, your assistance on this and other issues that fall under the Conservation and Forestry Subcommittee. And the Members on both sides of the aisle are here because you want to be on this Subcommittee, and that it should be heartening to those who are affected by the jurisdiction of the Subcommittee. So thank you all for the great work you are about to do.

And with that, I will yield back.

The CHAIRMAN. Thank you, Mr. Chairman.

The chair would request that other Members submit their opening statements for the record so that the witnesses may begin their testimony, and to ensure that there is ample time for questions. The chair would also like to remind Members that they will be recognized for questioning in order of seniority for Members who were present at the start of the hearing, after that, Members will be rec-

ognized in order of their arrival. I certainly appreciate the Members' understanding.

Witnesses are reminded to limit their oral presentations to 5 minutes. All written statements will be included in the record. And I just call your attention to the light system we have. You will have 5 minutes when it is green, you have 1 minute remaining, when it is yellow, and when we get to the red, I would just ask you to finish whatever line of thought that you are currently on. We have two panels today full of great witnesses, and I assure you that the written testimony has been distributed ahead of time. We really appreciate the effort that went into—I thought your written testimony was well done and very thorough. And we are expecting a vote series later this afternoon, so we are going to try to stay on-track with the 5 minutes.

So I would like to welcome our witnesses to the table. As the Ranking Member has already noted, we are pleased to have the Honorable Jeff M. Witte, Director/Secretary, New Mexico Department of Agriculture, on behalf of the National Association of Departments of Agriculture, from Las Cruces, New Mexico. We have the Honorable Robert "Pete" Smeltz, Clinton County Commissioner, on behalf of the National Association of Counties, McElhattan, Pennsylvania. We have Mr. Joseph S. Fox, State Forester, Arkansas Forestry Commission, on behalf of the National Association of State Foresters, Little Rock, Arkansas. And Ms. Martha Clark Mettler, Deputy Assistant Commissioner of the Office of Water Quality, Indiana Department of Environmental Management, on behalf of the Association of Clean Water Administrators, from Indianapolis, Indiana.

With that, Secretary Witte, please begin when you are ready.

STATEMENT OF HON. JEFF M. WITTE, DIRECTOR/SECRETARY, NEW MEXICO DEPARTMENT OF AGRICULTURE, LAS CRUCES, NM; ON BEHALF OF NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE

Mr. WITTE. Thank you, Chairman Thompson, Ranking Member Lujan Grisham, thank you for those kind opening remarks, and Members of the Subcommittee. Thank you for inviting me to join you this afternoon. It is truly an honor to be here.

My name is Jeff Witte, and I am here to represent the National Association of State Departments of Agriculture. I sit before you today to express my concerns with the significant negative impacts of the proposed *Waters of the U.S.* rule on farmers, ranchers, and people in other agricultural industries.

The stated intent of the proposed rule was to increase clarity and consistency, but in fact, it has done the opposite; creating confusion and uncertainty for agricultural producers, rural communities, and state governments.

New Mexico is an arid state with diverse landscapes, and overall, we get much less precipitation than other states. This means irrigated farms are reliant upon ditches fed by spring runoff which only flow ephemerally. The proposed definition of *ditches* has been a point of confusion since the rule's publication. It is unclear if many ditches that feed into the rivers will be considered tributaries

under section (s)(5), or will be excluded as ditches under section (t)(3) or (t)(4).

Ranchers are also dependent on catching rainwater for livestock and to control erosion, which may now be regulated under this rule. In the Southwest, we are especially concerned about jurisdiction over erosional features, such as arroyos. It is unclear from the rule if arroyos will be jurisdictional as small tributaries under section (s)(5) or excluded because of their status as an erosional feature as gullies are in section (t)(5)(vii).

This proposed rule leaves other important terms undefined. One such term, *prior converted cropland,* causes concern in the agricultural community. Across the nation, agricultural producers and regulators have expressed that they are unclear how the term *prior converted cropland* will be applied under the Clean Water Act. The rule exempts *prior converted cropland* from jurisdiction, but fails to define the term and fails to adopt any other agencies' existing definition.

The changes in the Clean Water Act are not just an issue in the arid West; Florida Commission Adam Putnam recently testified about the rule before the Joint Committee. He was worried that the proposal would assert jurisdiction over isolated wetlands located miles away from navigable waters. Another example is in Iowa where they have to drain their fields using a tile drainage system. The century-old system will have to be updated in the coming decades. My colleagues in Iowa estimate that the wetland mitigation associated with this upgrade would cost $1.8 billion without the rule, and under the proposed rule they estimate the expenditures could theoretically balloon to more than $57 billion over a 30 to 50 year period.

My team has worked with our state environmental permitting agency, the soil and water conservation districts, and others. We have concluded that this rulemaking represents a Federal overreach into state affairs; specifically, states' authority to manage water. States have been provided with the authority to manage water quality under the Clean Water Act. The New Mexico Environment Department stated in their comments that they are most significantly concerned that the proposed rule's definition of *tributary* will constitutionally increase Federal authority over the traditionally-held intrastate intermittent and ephemeral waters. These concerns, which have not yet been addressed, make managing water quality at the state level burdensome. In addition, the industries that support our nation's food system and public health would be affected by this rule. Pesticide labels, which carry important information about application and use, will change due to the expanded jurisdictional areas where they are prohibited. Pesticides are not used only for crops, they are also used in multiple other ways such as vector control to mitigate infectious diseases, and algae control to reduce harmful toxins in drinking water. Therefore, the expanded jurisdiction this rule calls for could negatively impact public health by reducing a regulator's ability to use these tools effectively.

Conservation efforts could also be affected by the changes resulting from the uncertainty in the rule. For example, in 2005, the BLM began the Restore New Mexico Initiative. This program

brings together Federal, state and local soil and water conservation districts and private partners, including farmers and ranchers, to restore landscapes across the state. These partners have restored more than 3 million acres by thinning overgrown forest, restoring native grasses, removing nonnative plants, and reclaiming abandoned oilfields. Over the past 10 years, at least $100 million, 40 percent from private partners, has been used for on-the-ground conservation programs. We have identified another 4 million acres in the state for restoration work. This rule puts that work in jeopardy. Increases in time and money required for permitting would divert resources away from conservation projects.

The average age of an agricultural producer in the U.S. is 58. Unclear regulations and burdens could dampen innovation and prevent younger generations from joining the family farm business. Without the opportunity for these young agriculturists to succeed, our reliable and superior food supply could be undermined.

EPA has stated that we can expect extensive revisions in the final rule. While we hope for extensive revisions, we are concerned that those revisions may not catch all of the issues that have caused individuals, organizations, local and state governments to submit over one million comments on this rule. In addition, EPA and the Army Corps have not posted all the comments or responded to them, yet, agencies have indicated their intent to finalize the rule in the near future.

My request to the Committee is that you support and encourage the complete withdrawal of this rule. Late this year in the Cromnibus of 2014—late last year in the Cromnibus of 2014, Congress——

The CHAIRMAN. Mr. Secretary, if you could go ahead and——

Mr. WITTE. I will wrap it up, sorry.

The CHAIRMAN. Thank you.

Mr. WITTE. So I appreciate the opportunity to be before the Committee today, and I will be happy to answer any questions.

[The prepared statement of Mr. Witte follows:]

PREPARED STATEMENT OF HON. JEFF M. WITTE, DIRECTOR/SECRETARY, NEW MEXICO DEPARTMENT OF AGRICULTURE, LAS CRUCES, NM; ON BEHALF OF NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE

Introduction

Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee, good morning and thank you for inviting me to join you this morning. My name is Jeff Witte, and I am here to represent the National Association of State Departments of Agriculture—NASDA. Everyone agrees that clean water is an important part of our nation's health. I know this because I grew up on a beef cattle ranch in my native state of New Mexico. I proudly serve as my state's Secretary of Agriculture, President of the Western Association of State Departments of Agriculture, and Chairman of NASDA's Natural Resources, Pesticide Management, and Environment Committee.

In my various roles, I promote agriculture and protect consumers and producers through a host of regulatory programs—including regulatory programs to ensure the protection of my state's natural resources. I sit before you today to express my concerns with the significant negative impacts of the proposed *Waters of the United States* (WOTUS) Rule on farmers, ranchers, and people in other agricultural industries.

The stated intent of the proposed rule was to increase clarity and consistency. In fact, it has done the opposite: creating confusion and uncertainty for agricultural producers, rural communities, and state governments. The impacts of the rule are so potentially harmful, it should be withdrawn. We request that Federal water regu-

lators take a more collaborative approach in working with state and local stakeholders to draft a rule that works for everyone.

Impacts in New Mexico and Across the Country

In New Mexico, agriculture contributes approximately $4 billion to the economy every year[1] and is the backbone of rural communities. New Mexico products our country treasures—such as cheese, pecans, and chili peppers—and the hardworking families that bring them to us, would be directly impacted by the proposed rule.

New Mexico is an arid state with diverse landscapes; and, overall, we get much less precipitation than other states. This means irrigated farms are reliant upon ditches fed by spring runoff, which only flow ephemerally. The proposed definition of ditches have been a point of confusion since the publication of the proposed rule. It is unclear if the many ditches that feed from rivers will be considered "tributaries" under section (s)(5) or will be excluded as "ditches" under section (t)(3) or (t)(4).

Similarly, ranchers are often dependent on catching rainwater for livestock and to control erosion, which may be regulated under this rule. Of special concern in the Southwest is the potential inclusion of ephemeral erosional features such as arroyos, which are similar to gullies. Again, it is unclear from the rule if arroyos will be jurisdictional as small "tributaries" under section (s)(5) or excluded because of their status as an "erosional feature" as gullies are in section (t)(vii).

Waters that have traditionally been available for agriculture without the need for permits will now be subject to permitting under the proposed rule—adding time and costs to the production of food on the 2.1 million farms throughout our country. The time sensitive nature of agricultural production may be at risk due to addition scrutiny and potential legal challenges associated with determining jurisdictional waters.

Among the many terms that are left undefined in the proposed rule, "prior converted croplands" is of specific concern to the agricultural community. This is not just an issue in arid states; across the nation agricultural producers and regulators have expressed concern for how the Clean Water Act (CWA) will apply this term. Although, the Environmental Protection Agency (EPA) does not define "prior converted croplands," other agencies such as the Natural Resources Conservation Service only afford this status to wetlands that were cropped before 1985. This barrier could have profound impacts on rural economies in addition to the nation's ability to provide enough food for a growing population.

Farmers and ranchers throughout the country—including those in wetter states—have also expressed concern with the rule. For instance, Florida Commissioner Adam Putnam recently testified on the consequences that this proposal would have for lands located near isolated wetlands with the expansion of Federal jurisdiction.

Another example is in Iowa. My colleagues have estimated that wetland mitigation costs associated with upgrading that state's century-old tile drainage system could increase under the proposed rule from $1.8 billion to more than $57 billion in coming decades.[2]

Further, we have significant concerns that farmers and ranchers will face uncertain permitting requirements and legal liabilities under section 402 of the CWA, which requires National Pollutant Discharge Elimination System permits for point source discharges near a jurisdictional water.

Jurisdictional Issues

My team has worked with our own environmental permitting agency, Soil and Water Conservation Districts, and other stakeholders. We have concluded this rulemaking represents a Federal overreach into state affairs, specifically states' authority to manage and allocate water.

States have been provided with the authority to manage water quality under the CWA. The New Mexico Environment Department specifically stated in their comments that they are "most significantly concerned that the proposed rule's definition of 'tributary' will unconstitutionally increase Federal authority over traditionally

---

[1] National Agricultural Statistics Service. (2012). *2012 Census of Agriculture*—2012 Census Volume 1, Chapter 1: State Level Data: New Mexico. Retrieved from USDA: *http://agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/New_Mexico/*.

[2] Personal Communication between NASDA staff and staff of Division of Soil Conservation, Iowa Department of Agriculture and Land Stewardship.

held intrastate intermittent and ephemeral waters . . .”[3] These concerns, which have yet to be addressed, make managing water quality and conservation practices at the state level burdensome.

Since the proposed rule was published in April 2014, EPA and the Army Corps have not been consistent. The agencies have variously said that jurisdiction will increase,[4–5] decrease,[6] and will not change.[7] There is a significant lack of clarity in the proposed definitions. Furthermore, interpretation of the rule would be left to the discretion of the district offices of the Army Corps across the nation, which adds ambiguity and inconsistency to the process. The “other waters” category in section (s)(7) leaves many waters in question to the discretion of individuals—creating an unreliable and uncertain business environment.

These issues create both regulatory uncertainty and untold economic consequences for farmers and ranchers. Farmers and ranchers who have historically utilized waters that were not jurisdictional will have to commit valuable time and resources in learning the permitting process and pursuing a permit if needed, causing delays in production.

Additionally, the industries that support our nation’s food system—and public health—would be affected by this rule. Pesticide labeling, which informs users and regulators of where pesticides are allowed and appropriate, will change due to expanded jurisdictional areas in which they are prohibited. For example, a pesticide that is labeled inappropriate for use near water may no longer be allowed for use on arroyos or dry ditches to control noxious weeds and invasive species. Pesticides are not only used for crops but are also used for vector control to reduce infectious diseases and algae control to reduce harmful toxins in drinking water downstream. The expanded jurisdiction this rule calls for could negatively impact public health.

Effect on Business

The Small Business Administration (SBA) has expressed concern that EPA and Army Corps inappropriately used a nearly thirty year old baseline to certify small business impacts. Further, the SBA said the rule does indeed impose costs directly on small businesses.[8] The bottom line is the rule would have significant economic consequences on small businesses including farmers and ranchers because they would have to pay for permits when they have not been required to in the past.

Restoration Initiatives

The changes and uncertainty resulting from this rule not only affect agriculture but can also hamper environmental restoration conducted by several Federal agencies and soil and water conservation districts in my state.

In 2005 the Bureau of Land Management began the Restore New Mexico initiative. This program brings together Federal, state, and private partners—including farmers and ranchers—to restore landscapes across the state. So far, these partners have successfully restored more than 3 million acres by thinning overgrown forests, restoring native grasses, removing thirsty nonnative species, reclaiming abandoned oil fields, and more.[9] Over the last 10 years, at least $100 million—40 percent from farmers and ranchers—has been used for on-the-ground conservation programs.[10]

---

[3] New Mexico Environment Department. (2014, November 14). New Mexico Environment Department’s Comments Regarding Proposed Regulatory Changes to the Definition of “*Waters of the United States*” Under the Clean Water Act.

[4] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. “Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*,” March 2014. *http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf*.

[5] The Brattle Group. “Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*” May 15, 2014. Available at: *http://www.brattle.com/news-and-knowledge/publications/archive/2014*.

[6] Stoner, Nancy. “Setting the Record Straight on *Waters of the U.S.*” *EPA Connect,* July 7, 2014. *http://blog.epa.gov/epaconnect/author/nancystoner/*.

[7] U.S. Environmental Protection Agency. “Clean Water Act Exclusions and Exemptions Continue for Agriculture,” *http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf*.

[8] The Office of Advocacy. (2014, October 21). *Definition of “**Waters of the United States**” Under the Clean Water Act.* Retrieved from U.S. Small Business Administration: *https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act*.

[9] BLM. (2014, October 7). *Accomplishments: Restore New Mexico.* Retrieved from U.S. Department of the Interior: *http://www.blm.gov/nm/st/en/prog/restore_new_mexico/restore_new_mexico.html*.

[10] Mr. Ken Leiting, New Mexico Association of Conservation Districts.

[11] Kalvelage, Jim. (July 26, 2012). “Cost of Little Bear Fire suppression tops $19 million.” *Ruidoso News. http://www.ruidosonews.com/ci_21163264/cost-little-bear-fire-suppression-tops-19-million*.

There are still 4 million acres identified for restoration and conservation. This rule puts that work in jeopardy due to increases in time and money required for permitting, which would otherwise be spent on important conservation projects and on maintaining the important work that has already been completed.

Watershed restoration and conservation projects also address wildfire concerns. The rule could impede land management agencies from conducting timely restoration projects. Preventative watershed conservation projects are much less costly than the mitigation and rehabilitation activities that must occur after catastrophic fires—which are becoming more common in western states. It is our hope that these imperative, preventative measures do not face increased costs or delays from permitting now that jurisdictional waters would increase.

Over $19 million was spent on fighting the Little Bear fire in southern New Mexico in 2012.[11] This does not include the restoration work that continues in this region. We are concerned that fire suppression and rehabilitation activities may be delayed or impeded by additional permitting requirements. It is unclear where the funds to complete permitting will come from—from the private entities that are severely affected or from the state and Federal agencies that are working so hard to suppress fires and restore these landscapes.

Conclusion

Our nation's food security rests on the shoulders of our farmers and ranchers. The confusion and uncertainty from this proposed rule may adversely affect them. The rule would cause negative consequences without any clear benefit beyond existing CWA regulations.

Farming and ranching is already a risky business, and adding this level of uncertainty would make many young farmers and ranchers think twice about entering the profession. Since the average age of agricultural producers in the United States is 58 years old,[12] implementing unclear regulations may prevent future innovation in the agricultural economy. Without the opportunity for these young agriculturalists to succeed, our reliable and superior food supply could be undermined.

EPA has stated that we can expect extensive revisions in the final rule. We do hope for extensive revisions, but we are concerned that the revisions may not catch all issues that have caused individuals, organizations, and local and state governments to submit over one million comments on this rule. In addition, the EPA and the Army Corps have not posted all public comments or responded to them, yet the agencies have indicated they intend to send the rule to be finalized to the Office of Management and Budget in the very near future. Given the magnitude of comments received and the clear requirement to respond prior to finalization, the agencies are neglecting their duty to provide good faith effort to address public concerns.

If finalized in its current form, the Federal agencies may not have the resources to implement the rule. Monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs—potentially creating an unfunded mandate to states.

My request of the Committee is that you support and encourage the complete withdrawal of this rule. Late last year in the "Consolidated and Further Continuing Appropriations Act of 2015," Congress directed the agencies to withdraw the flawed Agricultural Interpretive Rule. Our hope is that the same can be done for the proposed rule itself. State and local governments have expressed dissatisfaction with the very low level of collaboration in this process. We request more robust involvement opportunities to help revise this rule to benefit all interested parties.

I appreciate the opportunity to testify before you today, and I welcome any questions you may have.

The CHAIRMAN. I look forward to that exchange, and to give you a chance to address some of those last points.

Commissioner Smeltz, once again, it is good to have somebody from home here. Welcome, and go ahead and proceed with your 5 minutes of testimony please.

---

[11] Kalvelage, Jim. (July 26, 2012). "Cost of Little Bear Fire suppression tops $19 million." *Ruidoso News. http://www.ruidosonews.com/ci_21163264/cost-little-bear-fire-suppression-tops-19-million*.

[12] U.S. Department of Agriculture. "2012 Census of Agriculture." *http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/*.

STATEMENT OF HON. ROBERT "PETE" SMELTZ, COMMISSIONER, CLINTON COUNTY, PENNSYLVANIA, McELHATTAN, PA; ON BEHALF OF NATIONAL ASSOCIATION OF COUNTIES

Mr. SMELTZ. Yes, it is good to be here, and thank you Chairman Thompson, and, Ranking Member Grisham, and Members of the Subcommittee.

The CHAIRMAN. Commissioner, you just want to just suspend for a second, we will see about plan B. Go ahead, sir. You can go ahead and start from the beginning.

Mr. SMELTZ. Okay. How is that? Okay, very good.

Again, thank you. Thank you, Chairman Thompson, and Ranking Member Grisham, for the opportunity to testify today before you, and Members of the Subcommittee as well, for the opportunity to testify on how the proposed *Waters of the U.S.* rule could impact rural America.

My name is Pete Smeltz. I am an elected County Commissioner from Clinton County, Pennsylvania, and today I am representing the National Association of Counties.

As a County Commissioner, I interact with constituents and local businesses every day. Prior to my election as a County Commissioner, I spent 35 years with the Pennsylvania Department of Transportation, managing over 300 road miles and their drainage systems. Clinton County, Pennsylvania, is considered rural, with a population of just under 40,000 residents. The vast majority of our county is made up of forest and some farmland. Our state and local governments have a long history of protecting our water resources. Across Pennsylvania, I have heard concerns about how we could be affected by the proposed rule, and these concerns have been echoed by counties of all sizes across the country.

NACo has worked closely with technical experts, including county engineers, legal staff, public works directors, and stormwater managers, and ultimately called for the proposed rule to be withdrawn until further analysis and consultation with local officials is completed. This decision was not taken lightly, and we worked very hard to both ensure public safety, while protecting water quality.

Counties in Pennsylvania and across the country accomplish these goals by working with conservation districts, zoning, passing ordinances, and regulating stormwater runoff and illegal discharges. I am here today to share with you the four main reasons we decided to call for the withdrawal of the proposed rule.

First, this issue is so important because counties build, own and maintain a significant portion of public safety infrastructure, and the proposed rule would have direct and extensive implications. Local governments own almost 80 percent of all the public road miles, and so own and maintaining roadside ditches, they are responsible for flood control channels, stormwater systems, and culverts. In Pennsylvania, counties own over 4,000 bridges, which require construction and maintenance projects. Because we own so much infrastructure, and are responsible for public safety, defining which waters and conveyances fall under Federal jurisdiction has a direct impact on counties.

Second, the agencies developing the proposed rule did not sufficiently consult with local governments. Counties are not just stake-

holders in this discussion; we are partners in our nation's intergovernmental system. By law, Federal agencies are required to consult with their state and local partners before a rule is published, and throughout its development. However, this process was not completed by the agencies.

This leads to my third point. Due to this inadequate consultation, many terms in the proposed rule are vague and create uncertainty and confusion at the local level. For example, the proposed rule introduces new definitions of *tributary, significant nexus, adjacency, riparian areas,* and *floodplains.* Depending on how these terms are interpreted, additional public infrastructure could fall under Federal jurisdiction. The proposed rule as currently written only adds to the confusion and uncertainty over how this would be implemented consistently across all regions.

Our fourth and final reason for calling for the withdrawal is that the current permitting process tied to the *Waters of the U.S.* already presents significant challenges for counties. The proposed rule would only complicate matters. For example, one Florida county applied for 18 maintenance exemptions on the county's network of drainage and ditches and canals. The permitting process became so challenging that the county had to hire a consultant to complete all of the technical material required. Three months later, as the county moved into its rainy season, and after $600,000 had been invested, decisions on 16 of the exemptions was still pending. Ditches began to flood, putting the public at risk, and this is just one of many examples.

In conclusion, while many have attempted to paint this as a political issue, in the eyes of county governments, this is a matter of practicality and partnership. We look forward to working with you and the agencies to craft a clear and workable definition of *Waters of the U.S.* that achieves our shared goal. Our shared goal, which is to protect water quality without inhibiting the public safety and economic vitality of our communities.

And I thank you all again for this opportunity to address you this afternoon.

[The prepared statement of Mr. Smeltz follows:]

PREPARED STATEMENT OF HON. ROBERT "PETE" SMELTZ, COMMISSIONER, CLINTON COUNTY, PENNSYLVANIA, MCELHATTAN, PA; ON BEHALF OF NATIONAL ASSOCIATION OF COUNTIES

Thank you, Chairman Thompson, Ranking Member Grisham and Members of the Subcommittee for the opportunity to testify on the impact the proposed "*waters of the U.S.*" rule will have on rural America.

My name is Robert "Pete" Smeltz, I am an elected County Commissioner from Clinton County, Pa. and today I am representing the Nation Association of Counties (NACo).

About NACo

NACo is the only national organization that represents county governments in the United States, including Alaska's boroughs and Louisiana's parishes. Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

About Counties

Counties are highly diverse, not only in my Commonwealth of Pennsylvania, but across the nation, and vary immensely in natural resources, social and political systems, cultural, economic, public health and environmental responsibilities. Counties range in area from 26 square miles (Arlington County, Virginia) to 87,860 square

miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased Federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Regardless of size, counties nationwide continue to be challenged with fiscal constraints and tight budgets. According to a *2014 County Economic Tracker*[1] report released by NACo in January, only 65 of the nation's 3,069 counties have fully recovered to pre-recession levels, due to their booming energy and agricultural economies. However, in many parts of the country, the economic recovery is still fragile. In addition, county governments in more than 40 states must operate under restrictive revenue constraints imposed by state policies, especially property tax assessment caps.

About Clinton County, Pennsylvania

As a County Commissioner, I interact with constituents and businesses on a daily basis. Prior to my election as a county commissioner, I spent 35 years with the Pennsylvania State Department of Transportation (PENNDOT) and managed over 300 highway road miles and their drainage systems.

Clinton County, Pennsylvania is considered "rural" with a population of just under 40,000 residents. The county is located in north central Pennsylvania and has a land mass of 897[2] miles—the northern and western parts of the county are heavily forested and mountainous and the southern section has an agriculture-based economy. Approximately 70 percent of the county is forested, 20 percent is farm valley and ten percent is developed. The average yearly salary for our residents is $36,000 and our primary economic drivers include paper product facilities, furniture production, businesses directly and indirectly related to the Marcellus Shale gas drilling industry, transportation and construction equipment sales and service, Lock Haven University and state governmental agencies.

Clinton County, Pa. is fortunate to be home to an abundance of outdoor recreational opportunities. The county is known as the "Gateway to the Pennsylvania Wilds" because it is home to thousands of miles of state forests, state parks, state games lands, fishing destinations and the west branch of the Susquehanna River. Seventy percent of the streams and rivers in the county are already stringently protected under Pennsylvania's Clean Streams Law (Pa. Act 394 of 1937) and other state-specific water quality statutes. The state of Pennsylvania and its localities have a long history of protecting local water resources.

Many of the projects our state and localities are working on—and many other county projects across the nation—would be significantly affected by the changes to

[1] Nat'l Ass'n of Counties, *County Tracker 2014: On the Path to Recovery,* NACo Trends Analysis Paper Series, (2014).

the definition of "*waters of the U.S.*" that have been proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). **Therefore, we have urged the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed.** In fact, many prominent national associations of regional and local officials have expressed similar concerns, including the County Commissioners Association of Pennsylvania, U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Association of County Engineers, American Public Works Association and the National Association of Flood and Stormwater Management Agencies.

Today, I will discuss potential on-the-ground impacts of this proposed rule on my county and on counties nationwide.

1. **The "*Waters of the U.S.*" Proposed Rule Matters to Counties—***Clean water is essential for public health and safety, and state and local governments play a significant role in ensuring that local water resources are protected. This issue is so important to counties because not only do we build, own and maintain a significant portion of public safety infrastructure, we are also mandated by law to work with Federal and state governments to implement Clean Water Act (CWA) programs.*
2. **The Consultation Process with State and Local Governments was Flawed—***Counties are not just another stakeholder group in this discussion—we are a key partner in our nation's intergovernmental system. Because counties work with both Federal and state governments to implement Clean Water Act (CWA) programs, it is important that all levels of government work together to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs.*
3. **Counties Have Significant Concerns with the Proposed Rule; A One-Size-Fits-All Federal Regulation is Not the Answer—***For over a decade, counties have been voicing concerns on the existing "**waters of the U.S.**" definition, as there has been much confusion regarding this definition, even after several Supreme Court cases. While we agree that there needs to be a clear, workable definition of "**waters of the U.S.**," we do not believe that the new proposed definition provides the certainty and clarity needed for operations at the local level. After consulting extensively with county technical experts—including county engineers, attorneys, stormwater managers and other county authorities—on the proposed rule's impact on daily operations and local budgets, our key concerns include undefined and confusing definitions and potential for sweeping impacts across all Clean Water Act programs.*
4. **The Current Process Already Presents Significant Challenges for Counties; the Proposed Rule Only Complicates Matters—***Under Federal law, as it pertains to the Clean Water Act, counties serve as both the regulator and regulated entity and are responsible for ensuring that clean water goals are achieved and that our constituents are protected. However, the current system already presents major challenges—including getting permits approved by the agencies in a timely manner, juggling multiple and often duplicative state and Federal requirements, and anticipating and paying for associated costs. The proposed rule, as currently written, only adds to the confusion and uncertainty over how it would be implemented consistently across all regions.*

1. The "*Waters of the U.S.*" Proposed Rule Matters to Counties

First, clean water is essential to all of our nation's counties, who play vital roles in protecting our citizens by preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties support clean water and play a key role in protecting the environment. We pass zoning and other land use ordinances to safeguard valuable natural resources and protect our local communities depending on state law and local responsibility. Counties provide extensive outreach and education to residents on water quality and stormwater impacts. We also establish rules on illicit discharges and fertilizer ordinances, remove septic tanks, work to reduce water pollution, adopt setbacks for land use plans, and are responsible for water recharge areas, green infrastructure and water conservation programs.

Counties must also plan for the unexpected and remain flexible to address regional conditions that may impact the safety and well-being of our citizens. Specific regional differences, including condition of watersheds, water availability, climate,

topography and geology are all factored in when counties implement public safety and common-sense water quality programs.

For example, some counties in low-lying areas have consistently high groundwater tables and must carefully maintain drainage conveyances to both prevent flooding and reduce breeding grounds for disease-causing mosquitoes. On the other hand, counties in the arid West are facing extreme drought conditions in which the availability of water has become scarce. In these regions, counties are using infrastructure to preserve water for future use.

In my Commonwealth of Pennsylvania, conservation districts are authorized to make critical front-line decisions relating to many aspects of waterway planning and management, including stormwater management, flood mitigation and maintenance of dams and levees (Pa. Act 217 of 1945, Section 2). While the Clinton County Conservation District is an independent entity, the county funds 40 percent of its annual budget and the district oversees the state's stormwater management permitting program, dirt and gravel road pollution prevention, programs to ensure water quality and protect the public from flooding.

Second, counties have much at stake in this discussion as we are major owners of public infrastructure, including 45 percent of America's road miles, nearly 40 percent of bridges, 960 hospitals, more than 2,500 jails, 650 nursing homes and ⅓ of the nation's airports. Counties also own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule, including roadside ditches, flood control channels, stormwater culverts and pipes, Municipal Separate Storm Sewer Systems (MS4), and other infrastructure used to funnel water away from low-lying roads, properties and businesses. These not only protect our water quality, but prevent accidents and flooding. *Defining what waters and their conveyances fall under Federal jurisdiction has a direct impact on counties who are legally responsible for maintaining public safety ditches and other infrastructure.*

In Pennsylvania, counties own more than 4,000 bridges. One rural Pennsylvania county had a significant issue with debris piling up against a railroad bridge, creating a flooding hazard, the county had to act quickly to protect public safety. However, due to the complicated permitting and planning aspects of the Federal section 404 permit process, the estimated costs for the project soared to over $100,000, which was cost prohibitive for the county. Instead, the county worked with the state to craft a limited work plan that reduced flooding, but did not eliminate the problem, and kept costs to $10,000.

Counties are also the first line of defense in any disaster, particularly as it relates to public infrastructure. Following a major disaster, county local police, sheriffs, firefighters and emergency personnel are the first on the scene. In the aftermath, counties focus on clean-up, recovery and rebuilding. In 2004, after the remnants of Hurricane Ivan roared through the county and flooded nearly 1,000 homes and businesses, local governments moved quickly to work with the state and multiple Federal agencies to rebuild critical infrastructure.

This is neither a partisan nor a political issue for counties. It is a practical issue and our position has been guided by county experts—county engineers, attorneys and stormwater practitioners—who are on the ground working every day to implement Federal and state mandated rules and policies. NACo's position on the proposed rule has been approved and supported by urban, suburban and rural county elected officials and our association's policy is based on the real world experiences of county governments within the current Clean Water Act (CWA) permitting process.

2. The Consultation Process with State and Local Governments was Flawed

Counties are not just another stakeholder group in this discussion—we are a key part of the Federal-state-local partnership. Because counties work with both Federal and state governments to implement Clean Water Act (CWA) programs, it is important that all levels of government work together to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs.

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism (E.O. 13132). Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which calls for meaningful consultation with impacted state and local governments.

Under RFA and E.O. 13132, Federal agencies are required to work with impacted state and local governments on proposed regulations that will have a substantial di-

rect effect on them. We believe the "*waters of the U.S.*" proposed rule triggers Federal consultation requirements with state and local governments.

As part of the RFA process, the agencies must "certify" that the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). Small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. To certify a proposed rule, Federal agencies must provide a "factual basis" to determine that a rule does not impact small entities. This means "at minimum . . . a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."

The RFA SISNOSE process allows Federal agencies to identify areas where the proposed rule mayeconomically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, that there was "no SISNOSE"—and therefore did not provide the necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, Small Business Administration's Office of Advocacy (Advocacy) expressed significant concerns that the proposed "*waters of the U.S.*" rule was "improperly certified . . . used an incorrect baseline for determining . . . obligations under the RFA . . . imposes costs directly on small businesses" and "will have a significant economic impact . . ." Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking." **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy's conclusions.**

Within the proposed rule, the agencies indicated that they "voluntarily undertook federalism consultation." While we appreciate the agencies' outreach efforts, we believe that EPA prematurely truncated the Federalism consultation process. In 2011, EPA initiated a formal Federalism consultation process but in the 17 months between the consultation and the proposed rule's publication, the agency failed to avail itself of the opportunity to continue meaningful discussions during this intervening period, thereby failing to fulfill the intent of Executive Order 13132 and the agency's internal process for implementing it.

Further, because a thorough consultation process was not followed, the agencies released an incomplete and inaccurate economic analysis that did not fully capture the potential impact on other Clean Water Act programs. Further, the agencies used permit applications from 2009–2010 as a baseline to estimate the costs when there was more current data available. NACo has repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.

3. Counties Have Significant Concerns with the Proposed Rule; A One-Size-Fits-All Federal Regulation Is Not the Answer

For over a decade, counties have been voicing concerns regarding the existing "*waters of the U.S.*" definition, as there has been much confusion regarding this definition even after several Supreme Court decisions on this issue. While we agree that there needs to be a clear, workable definition of "*waters of the U.S.*," we do not believe that the new proposed definition provides the certainty and clarity needed for operations at the local level.

After consulting extensively with county technical experts—including county engineers, attorneys, stormwater managers and other county authorities—on the proposed rule's impact on daily operations and local budgets, we are very concerned about:

- *undefined and confusing definitions.*
- *cascading negative impacts across all Clean Water Act programs.*

First, specific definitions within the proposed rule are undefined and unclear, this lack of clarity could be used to claim Federal jurisdiction more broadly. The proposed rule extends the "*waters of the U.S.*" definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that could increase the types of public infrastructure considered jurisdictional under the CWA. For counties that own and manage public safety infrastructure, the potential implication is that public safety

ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different.

NACo has worked with the agencies to clarify these key terms and their intent, but has received little assurance about how each region will interpret and implement the new definition. In fact, the agencies have delivered inconsistent information about which waters would or would not be covered under Federal jurisdiction.

Second, the proposed rule could have a cascading impact on all CWA programs, not just the section 404 program. This means that changing the definitions within the proposed rule could have far-reaching impacts on even more local stormwater programs and county owned infrastructure. NACo has asked for clarification from the agencies and has yet to receive a direct answer on the potential reach and implications of a new definition on "*waters of the U.S.*"

4. The Current Clean Water Act Section 404 Permit Process Already Presents Significant Challenges for Counties; the New Proposed Rule Only Complicates Matters

Under Federal law, as it pertains to the Clean Water Act, counties serve as both the regulator and regulated entity and are responsible for ensuring that clean water goals are achieved and that their constituents are protected. In practical terms, many counties implement and enforce Clean Water Act programs, and also must meet Clean Water Act requirements themselves. However, the current system already presents major challenges—including the existing permitting process, multiple and often duplicative state and Federal requirements, and unanticipated project delays and costs. *The proposed rule, as currently written, only adds to this confusion and complicates already inconsistent definitions used in the field by local agencies in different jurisdictions across the country.*

Ditches are pervasive in counties across the nation; until recently, they were not required to have Federal CWA Section 404 permits. However, in recent years, some Corps districts have inconsistently required counties to have Federal permits for construction and maintenance activities on our public safety ditches. It is critical for counties to have clarity, consistency and certainty on the types of public safety infrastructure that require Federal permits.

Next, the current process is already complex, time-consuming and expensive, leaving local governments and public agencies vulnerable to citizen suits. Counties across the nation have experienced delays and frustrations with the current section 404 permitting process. If a project is deemed to be under Federal jurisdiction, other Federal requirements are triggered, such as environmental impact statements, the National Environmental Policy Act (NEPA) process and Endangered Species Act (ESA) implications. These assessments often involve intensive studies and public comment periods, which can delay critical public safety upgrades to county owned infrastructure and add to the overall time and cost of projects.

One Midwest county had five road projects that were significantly delayed by the Federal permitting process for over 2 years. After studying the projects, the county determined that the delays and extra requirements added approximately $500,000 to the cost of completing these projects. Some northern counties have even missed entire construction seasons as they waited for Federal permits.

Under the current Federal program, counties can utilize a maintenance exemption to move ahead with necessary upkeep of ditches (removing vegetation, extra dirt and debris)—however, the approval of such exemptions is sometimes applied inconsistently, not only nationally but within regions. These permits come with strict special conditions that dictate when and how counties can remove grass, trees and other debris that cause flooding if they are not removed from the ditches.

For example, one California county was told that they had to obtain a maintenance permit to clean out an earthen stormwater ditch. Because the ditch is now under Federal jurisdiction, the county is only permitted to clear overgrowth and trash from the ditch 6 months out of the year due to potential ESA impacts. Since the county is not allowed to service the ditch regularly, it has flooded private property several times and negatively impacted the surrounding community.

Another county in Florida applied for 18 specific maintenance exemptions on the county's network of drainage ditches and canals. The Federal permitting process became so challenging that the county ended up having to hire a consultant to compile all of the data and surveying materials that were required for the exemptions. Three months later and at a cost of $600,000, the county was still waiting for 16 of the exemptions to be determined. At that point, the county was moving into its seasonal rainy season and had to deal with calls from residents as ditches that did not have a decision from the Corps were flooding.

As a former PENNDOT employee that managed Clinton County, Pa.'s extensive highway system, I have experienced how excessive and unclear regulations can jeop-

ardize road maintenance projects. I have seen many road construction projects take more than a year to get through the Federal permitting process under current regulations. The more time-consuming and difficult the Federal permitting process, the higher the engineering costs for local governments, businesses and economies.

Additionally, counties are liable for ensuring that our public safety ditches are maintained and in some cases counties have faced lawsuits over ditch maintenance. In 2002, in *Arreola* v. *Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation.

Counties are also facing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. Even though the counties are following the state and Federal permitting rules on water quality, these groups are asserting that the permits are not stringent enough. A number of counties in Washington and Maryland have been sued over the scope and sufficiency of their approved MS4 permits.

These are just a few examples of the real impact of the current Federal permitting process. The new proposed rule creates even more confusion over what is under Federal jurisdiction. If the approval process is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety and stormwater ditches.

Conclusion

Chairman Thompson, Ranking Member Grisham and Members of the Subcommittee, the health, well-being and safety of our residents is a top priority for counties. Our bottom line is that the proposed rule contains many terms that are not adequately defined, and NACo believes that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal.

This is problematic because our members are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches, even if Federal permits are not issued by the Federal agencies in a timely manner. Furthermore, the unknown impacts on other CWA programs are equally problematic.

We ask that the proposed rule be withdrawn until further analysis has been completed and more in-depth consultation with state and local officials—especially practitioners—is undertaken. NACo and counties nationwide share the goal for a clear, concise and workable definition of "*waters of the U.S.*" to reduce confusion—not to mention costs—within the Federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

Counties stand ready to work with Congress and the agencies to craft a clear, concise and workable definition of "*waters of the U.S.*" to reduce confusion within the Federal CWA program. We look forward to working together with our Federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. We can achieve our shared goal of protecting the environment without inhibiting public safety and economic vitality of our communities.

Thank you again for the opportunity to testify today on behalf of America's 3,069 counties. I would welcome the opportunity to address any questions.

ATTACHMENT 1

November 14, 2014

DONNA DOWNING,
Jurisdiction Team Leader, Wetlands Division,
U.S. Environmental Protection Agency,
Washington, D.C.;

STACEY JENSEN,
Regulatory Community of Practice
U.S. Army Corps of Engineers,
Washington, D.C.

Re: Definition of "*Waters of the United States*" Under the Clean Water Act, Docket ID No. EPA–HQ–OW–2011–0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed rule on *Definition of "**Waters of the United States**" Under the Clean Water Act.*[1] We thank the agencies for their ongoing efforts to communicate with NACo and our members throughout this process. **We remain very concerned about the poten-**

[1] *Definition of **Waters of the U.S.** Under the Clean Water Act,* 79 FED. REG. 22188 (April 21, 2014).

tial impacts of the proposed rule and urge the agencies to withdraw it until further analysis has been completed.

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

The Importance of Clean Water and Public Safety

Clean water is essential to all of our nation's counties who are on the front lines of protecting the citizens we serve through both preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties are not just another stakeholder group in this discussion—they are a valuable partner with Federal and state governments on Clean Water Act implementation. To that end, it is important that the Federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining what waters and their conveyances fall under Federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

NACo shares the EPA's and Corps goal for a clear, concise and workable definition for "*waters of the U.S.*" to reduce confusion—not to mention costs—within the Federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

EPA asserts that they are not trying to regulate any waters not historically or previously regulated. But this is misleading. Prior to a 2001 Supreme Court decision,[2] virtually all water was jurisdictional. The EPA's and the Corps economic analysis agrees. It states that "Just over 10 years ago, almost all waters were considered '*waters of the U.S.*'"[3] This is why we believe the proposed rule is an expansion of jurisdiction over current regulatory practices.

Hundreds of counties, including their respective state associations of counties, have submitted public comments on the proposed rule over concerns about how it will impact daily operations and local budgets. We respectfully urge the agencies to examine and consider these comments carefully.

This letter will highlight a number of areas important to counties as they relate to the proposed rule:

- **Counties Have a Vested Interest in the Proposed Rule**
- **The Consultation Process with State and Local Governments was Flawed**
- **Incomplete Data was Used in the Agencies' Economic Analysis**
- **A Final Connectivity Report is Necessary to Justify the Proposed Rule**
- **The Clean Water Act and Supreme Court Rulings on "*Waters of the U.S.*"**
- **Potential Negative Effects on All CWA programs**
- **Key Definitions are Undefined**
- **The Section 404 Permit Program is Time-Consuming and Expensive for Counties**
- **County Experiences with the Section 404 Permit Process**
- **Based on Current Practices—How the Exemption Provisions May Impact Counties**
- **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**
- **States Responsibilities Under CWA Will Increase**
- **County Infrastructure on Tribal Land May Be Jurisdictional**
- **Endangered Species Act as it Relates to the Proposed Rule**

---

[2] *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'r* (*SWANCC*), 531 U.S. 159, 174 (2001).

[3] *U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), Econ. Analysis of Proposed Revised Definition of* ***Waters of the United States,*** (March 2014) at 11.

- **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

Counties Have a Vested Interest in the Proposed Rule

In the U.S., there are 3,069 counties nationally which vary in size and population. They range in area from 26[2] miles (Arlington County, Virginia) to 87,860[2] miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Forty-eight of the 50 states have operational county governments (except Connecticut and Rhode Island). Alaska calls its counties boroughs and Louisiana calls them parishes.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased Federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Changes to the scope of the "*waters of the U.S.*" definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts our local governments in a precarious position, choosing between environmental protection and public safety. Counties do not believe this needs to be an either/or decision if local governments are involved in policy formations from the start.

Regardless of size, counties nationwide are coping with fiscally tight budgets. County revenues have declined and ways to effectively increase county treasuries are limited. In 2007, our counties were impacted by the national financial crisis, which pushed the nation into a recession. The recession affected the capacity of county governments to deliver services to their communities. While a number of our counties are experiencing moderate growth, in some parts of the country, economic recovery is still fragile.[4] This is why we are concerned about the proposed rule.

The Consultation Process with State and Local Governments was Flawed

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism. Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments.

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires Federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed "*waters of the U.S.*" rule.

---

[4] Nat'l Ass'n of Counties, *County Tracker 2013: On the Path to Recovery,* NACo Trends Analysis Paper Series, (2014).

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule could have on small entities and provide less costly options for implementation. The Small Business Administration's (SBA) Office of Advocacy (Advocacy) oversees Federal agency compliance with RFA.

As part of the rulemaking process, the agencies must "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, Federal agencies must provide a "factual basis" to certify that a rule does not impact small entities. This means "at minimum . . . a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[5]

The RFA SISNOSE process allows Federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, there was "no SISNOSE"—and therefore did not provide a necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed "*waters of the U.S.*" rule was "improperly certified . . . used an incorrect baseline for determining . . . obligations under the RFA . . . imposes costs directly on small businesses" and "will have a significant economic impact." Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[6] **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy conclusions.**

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. **Under Executive Order 13132—Federalism, Federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.** We believe the proposed "*waters of the U.S.*" rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.[7] **A federalism impact statement was not included with the proposed rule.**

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.[8] Federalism may be triggered if a proposed rule has an annual implementation cost of $25 million for state and local governments.[9] Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."[10] Even if the rule is determined not to impact state and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."[11]

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."[12] While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue substantial discussions during this intervening**

---

[5] Small Bus. Admin. (SBA), Office of Advocacy (Advocacy), *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act,* (May 2012), at 12–13.

[6] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Adm'r, EPA and Gen. John Peabody, Deputy Commanding Gen., Corps of Eng'r, on Definition of "*Waters of the United States*" Under the Clean Water Act (October 1, 2014).

[7] Exec. Order No. 13132, 79 *Fed. Reg.* 43255 (August 20, 1999).

[8] U.S. Envtl. Prot. Agency, *EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism,* (November 2008).

[9] *Id.* at 6.

[10] *Id.* at 9.

[11] *Id.* at 11.

[12] 79 *Fed. Reg.* 22220.

period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.

Recommendations:

1. **Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a "no SISNOSE" determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA.**
2. **Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns.**
3. **Complete a multiphase, rather than one-time, Federalism consultation process.**
4. **Charter an *ad hoc*, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation.**
5. **Accept an ADR Negotiated Rulemaking process for the proposed rule:** Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached.

Incomplete Data was Used in the Agencies' Economic Analysis

As part of the proposed rule, the agencies released their cost-benefit analysis on *Economic Analysis of Proposed Revised Definition of* ***Waters of the U.S.*** (March 2014). We are concerned about the limited scope of this analysis since it bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. Since EPA has held its 2011 Federalism briefing on "*waters of the U.S.*," **we have repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.**[13–15]

The economic analysis uses CWA Section 404 permit applications from 2009–2010 as its baseline data to estimate the costs to all CWA programs. There are several problems with this approach. Based on this data, the agencies expect an increase of approximately three percent of new waters to be jurisdictional within the section 404 permit program. The CWA Section 404 program administers permits for the "discharge of dredge and fill material" into "*waters of the U.S.*" and is managed by the Corps.

First, we are puzzled why the agencies chose the span of 2009–2010 as a benchmark year for the data set as more current up-to-date data was available. In 2008, the nation entered a significant financial recession, sparked by the housing subprime mortgage crisis. Housing and public infrastructure construction projects were at an all-time low. According to the National Bureau of Economic Research, the recession ended in June 2009,[16] however, the nation is only starting to show

---

[13] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA & Jo Ellen Darcy, Assistant Sec'y for Civil Works, U.S. Dep't of the Army, "*Waters of the U.S.*" Guidance (July 29, 2011) available at *http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf*.

[14] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA, Federalism Consultation Exec. Order 13132: "*Waters of the U.S.*" Definitional Change (Dec. 15, 2011) available at *http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Dec%2015%202011_final.pdf*.

[15] Letter from Tom Cochran, CEO and Exec. Dir., U.S. Conf. of Mayors, Clarence E. Anthony, Exec. Dir., Nat'l League of Cities, & Matthew D. Chase, Exec. Dir., Nat'l Ass'n of Counties to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. and Budget, *EPA's Definition of "**Waters of the U.S.**" Under the Clean Water Act Proposed Rule & Connectivity Report* (November 8, 2013) available at *http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/NACo%20NLC%20USCM%20Waters%20of%20the%20US%20 Connectivity%20Response%20letter.pdf*.

[16] Nat'l Bureau of Econ. Research, Bus. Cycle Dating Comm. (September 20, 2010), available at *www.nber.org/cycles/sept2010.pdf*.

signs of recovery.[17] By using 2009–2010 data, the agencies have underestimated the number of new waters that may be jurisdictional under the proposed rule.

Second, the economic analysis uses the 2009–2010 Corps section 404 data as a baseline to determine costs for other CWA programs run by the EPA. Since there is only one "*waters of the U.S.*" definition used within the CWA, the proposed rule is applicable to all CWA programs. The Congressional Research Service (CRS), a public policy research arm of the U.S. Congress, released a report on the proposed rule that stated "costs to regulated entities and governments (Federal, state, and local) are likely to increase as a result of the proposal." The report reiterates there would be "additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges . . . for discharges to waters that would now be determined jurisdictional)." [18]

We are concerned the economic analysis focuses primarily on the potential impacts to CWA's Section 404 permit program and does not fully address the cost implications for other CWA programs. The EPA's and the Corps economic analysis agrees, ". . . the resulting cost and benefit estimates are incomplete . . . Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis." [19]

Recommendations:

- **NACo urges the agencies to undertake a more detailed and comprehensive analysis on how the definitional changes will directly and indirectly impact all Clean Water Act programs, beyond section 404, for Federal, state and local governments.**
- **Work with national, state and local stakeholder groups to compile up-to-date cost and benefit data for all CWA programs.**

A Final Connectivity Report is Necessary to Justify the Proposed Rule

In addition to the aforementioned issues, we are also concerned that the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* used as a scientific basis of the proposed rule, is still in draft form.

In 2013, EPA asked its' Science Advisory Board (SAB), which is comprised of 52 scientific advisors, to review the science behind the report. The report focused on more than 1,000 scientific studies and reports on the interconnectivity of water. In mid-October, 2014, the SAB completed its review of the draft report and sent its recommendations to the EPA.[20]

The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed "*waters of the U.S.*" rule.

Recommendation:

- **Reopen the public comment period on the proposed "*waters of the U.S.*" rule when the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report is finalized.**

The Clean Water Act and Supreme Court Rulings on "*Waters of the U.S.*"

Clean water is essential for public health and state and local governments play a large role in ensuring local water resources are protected. It is important state and local governments are involved as a significant partner in the CWA rule development process.

The Clean Water Act charges the Federal Government with setting national standards for water quality. Under a Federal agreement for CWA enforcement, the EPA and the Corps share clean water responsibilities. The Corps is the lead on the

---

[17] Cong. Budget Office, *The Budget & Economic Outlook: 2014 to 2024* (February 2014).

[18] U.S. Cong. Research Serv., *EPA & the Army Corps' Proposed Rule to Define "**Waters of the U.S.,**"* (Report No. R43455; 10/20/14), Copeland, Claudia, at 7.

[19] *Econ. Analysis of Proposed Revised Definition of **Waters of the U.S.,*** U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'r, 11 (March 2014), at 2.

[20] Letter from Dr. David T. Allen, Chair, Science Advisory Bd. & Amanda D. Rodewald, Chair, Science Advisory Bd. Panel for the Review of the EPA Water Body Connectivity Report to Gina McCarthy, Adm'r, EPA, *SAB Review of the Draft EPA Report Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Sci. Evidence* (October 17, 2014).

CWA Section 404 Dredge and Fill permit program and the EPA is the lead on other CWA programs.[21] 46 states have undertaken authority for EPA's section 402 NPDES permit program—EPA manages NPDES permits for Idaho, Massachusetts, New Hampshire and New Mexico.[22] Additionally, all states are responsible for setting water quality standards to protect "*waters of the U.S.*"[23]

"*Waters of the U.S.*" is a term used in CWA—it is the glue that holds the Clean Water Act together. The term is derived from a law that was passed in 1899, the Rivers and Harbors Act, that had to do with interstate commerce—any ship involved in interstate commerce on a "navigable water," which, at the time, was a lake, river, ocean—was required to have a license for trading.

The 1972 Clean Water Act first linked the term "navigable waters" with "*waters of the U.S.*" in order to define the scope of the CWA. The premise of the 1972 CWA was that all pollutants discharged to a navigable water of the U.S. were prohibited, unless authorized by permit.

In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" goes beyond traditionally navigable-in-fact waters. However, the courts also acknowledge there is a limit to jurisdiction. What that limit is within section 404 has yet to be determined and is constantly being litigated.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC)* v. *United States Army Corps of Engineers,* the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim Federal jurisdiction over an isolated wetland.[24] In *SWANCC,* Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.[25]

In 2006, in *Rapanos* v. *United States,* the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program.[26] In a 4–1–4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites.[27] Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

Potential Negative Effects on All CWA Programs

There is only one definition of "*waters of the U.S.*" within the CWA which must be applied consistently for all CWA programs that use the term "*waters of the U.S.*" While Congress defined "navigable waters" in CWA section 502(7) to mean "the *waters of the United States*, including the territorial seas," the Courts have generally assumed that "navigable *waters of the U.S.*" go beyond traditional navigable-in-fact waters such as rivers. However, the Courts also acknowledge there is a limit to Federal jurisdiction.

Previous Corps guidance documents on "*waters of the U.S.*" clarifications have been strictly limited to the section 404 permit program. A change to the "*waters of the U.S.*" definition though, has implications for ALL CWA programs. This modification goes well beyond solely addressing the problems within the section 404 permit program. These effects have not been fully studied nor analyzed.

Changes to the "*waters of the U.S.*" definition within the CWA will have far-reaching effects and unintended consequences to a number of state and local CWA programs. As stated before, the proposed economic analysis needs to be further fleshed out to recognize all waters that will be jurisdictional, beyond the current data of section 404 permit applications. CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, will be impacted.

---

[21] Memorandum of Agreement Between the Dep't of the Army & the Envtl. Prot. Agency Concerning the Determination of the Section 404 Program & the Applications of Exemptions Under Section (F) of the Clean Water Act, 1989.

[22] Cong. Research Service, *Clean Water Act: A Summary of the Law* (Report RL30030, October 30, 2014), Copeland, Claudia, at 4.

[23] *Id.*

[24] 531 U.S. 159, 174 (2001).

[25] *Id.*

[26] 547 U.S. 715, 729 (2006).

[27] *Id.*

Key Definitions are Undefined

The proposed rule extends the "*waters of the U.S.*" definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that will be used to claim jurisdiction more broadly. All of these terms will broaden the types of public infrastructure that is considered jurisdictional under the CWA.

"**Tributary**"—The proposed rule states that a tributary is defined as a water feature with a bed, bank, ordinary high water mark (OHWM), which contributes flow, directly or indirectly, to a "water of the U.S." A tributary does not lose its status if there are man-made breaks (bridges, culverts, pipes or dams) or natural breaks upstream of the break. The proposed rule goes on to state that "**A tributary . . . includes rivers, streams, lakes, ponds, impoundments, canals, and ditches . . .**"[28]

For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

"**Uplands**"—The proposed rule recommends that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are exempt, however, the term "uplands" is undefined.[29] This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to "*waters of the U.S.*" It is important to define the term "uplands" to ensure the exemption is workable.

"**Significant Nexus**"—The proposed rule states that "a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."[30]

This definition uses the watershed approach to determine jurisdiction—a watershed is an area of land where all of the rivers, streams, and other water features drain to the same place. According to the EPA, "Watersheds come in all shapes and sizes. They cross county, state, and national boundaries. In the continental U.S., there are 2,110 watersheds, including Hawaii, Alaska, and Puerto Rico, there are 2,267 watersheds."[31]

There are very few parts of the country that are not in a watershed. This definition would create burdens on local governments who maintain public safety ditches and infrastructure near natural waterbodies; this infrastructure could be considered jurisdictional under the "significant nexus" definition.

"**Adjacent Waters**"—Under current regulation, only those wetlands that are adjacent to a "*waters of the U.S.*" are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines adjacent as "bordering, contiguous or neighboring."[32]

Under the rule, adjacent waters include those located in riparian or floodplain areas.[33]

Expanding the definition of "adjacency," will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety, we would encourage the agencies to assess the unintended consequences.

"**Riparian Areas**"—The proposed rule defines "riparian area" as "an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Riparian areas are transitional areas between dry and wet areas.[34] Concerns have been

---

[28] 79 *Fed. Reg.* 22199.
[29] *Id.*
[30] *Id.*
[31] U.S. Envtl. Prot. Agency, "What is a Watershed?," available at *http://water.epa.gov/type/watersheds/whatis.cfm*.
[32] 79 *Fed. Reg.* 22199.
[33] *Id.*
[34] *Id.*

raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined.

"**Floodplains**"—The proposed definition states that floodplains are defined as areas with "moderate to high water flows."[35] These areas would be considered "water of the U.S." even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a "floodplain?"

Further, it is major problem for counties that the term "floodplain" is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple Federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies.

"**Neighboring**"—"Neighboring" is a term used to identify those adjacent waters with a significant nexus. The term "neighboring" is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring.[36] Using the term "neighboring," without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region.

Recommendations:

- **Redraft definitions to ensure they are clear, concise and easy to understand.**
- **Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all Federal agencies.**
- **Create a national map that clearly shows which waters and their tributaries are considered jurisdictional.**

The Section 404 Permit Program is Time-Consuming and Expensive for Counties

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under section 404 has significant financial implications for local governments and public agencies.

In recent years, certain Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance activities. Once a ditch falls under Federal jurisdiction, the section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the Federal permit process is not streamlined.

Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER Federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other Federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily 3 or more years, with costs in the millions for one project.

---

[35] *Id.*
[36] *Id.*

One Midwest county studied five road projects that were delayed over the period of 2 years. Conservatively, the cost to the county for the delays was $500,000. Some counties have missed building seasons waiting for Federal permits. These are real world examples, going on now, for many our counties. They are not hypothetical, "what if" situations. These are actual experiences from actual counties. The concern is, if more public safety ditches are considered jurisdictional, more counties will face similar problems.

Counties are liable for ensuring their public safety ditches are maintained and there have been cases where counties have been sued for not maintaining their ditches. In 2002, in *Arreola* v. *Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation. Counties are legally responsible for public safety infrastructure, regardless of whether or not the Federal agencies approve permits in a timely manner.

It is imperative that the section 404 permitting process be streamlined. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position—especially those who are balancing small budgets against public health and environmental protection needs.

The bottom line is, county ditch systems can be complex. They can run for hundreds of miles continuously. By their very nature, they drain directly (or indirectly) into rivers, lakes, streams and eventually the ocean. At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery, proposing far reaching changes to CWA's "*waters of the U.S.*" definition seems to be a very precarious endeavor and one which should be weighed carefully knowing the potential implications.

County Experiences with the Section 404 Permit Process

During discussions on the proposed "*waters of the U.S.*" definition change, the EPA asked NACo to provide several known examples of problems that have occurred in section 404 jurisdictional determinations, resulting in time delays and additional expenses. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300′ of a roadside ditch, the county would have to go through the individual permit process. The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of Federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a stormwater improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark." Thus, the county was forced to go through the individual permit process.

The delay associated with going through the Federal permit process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay tens of thousands in mitigation costs associated with the impacts to the concrete and metal structures. Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the Federal process.

Based on Current Practices—How the Exemption Provisions May Impact Counties

While the proposed rule offers several exemptions to the "*waters of the U.S.*" definition, the exclusions are vague and imprecise, and may broaden jurisdiction in a number of areas. Specifically, we are concerned about the exemptions on ditches and wastewater treatment systems.

"**Ditches**"—The proposed rule contains language to exempt certain types of ditches: (1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and (2) Ditches that do not contribute flow, either di-

rectly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.[37]

For a ditch to be exempt, it must be excavated and drain only to a dry area and be wet less than 365 days a year. This is immediately problematic for counties. County ditches are not dug solely in dry areas, because they are designed to drain overflow waters to "*waters of the U.S.*"

Counties own and manage different types of public safety ditches—roadside, drainage, flood control, stormwater—that protect the public from flooding. They can run continuously for hundreds, if not thousands, of miles throughout the county. Very few county ditches just abruptly end in a field or a pond. Public safety ditches are generally dug in dry areas, run through a transition area, before connecting directly or indirectly to a "water of the U.S."

Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a "*water of the U.S.,*" will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch's physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not "contribute to flow," directly or indirectly to "*waters of the U.S.*," will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate "no flow" to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. **Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.**[38] **Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety.**

The agencies have reiterated that the proposed rule leaves in place the current exemption on ditch maintenance activities.[39] EPA has indicated this exemption is automatic and that counties do not have to apply for the exemption if they are performing maintenance activities on ditches. **However, in practice, our counties have reported the exemption is inconsistently applied by Corps districts across the nation. Over the past decade, a number of counties have been required to obtain special section 404 permits for ditch maintenance activities.**

These permits often come with tight special conditions that dictate when and how the county is permitted to clean out the relevant ditch. For example, one California county has a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch 6 months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens. In the past several years, we've heard from a number of non-California counties who tell us they must get section 404 permits for ditch maintenance activities.

Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the "recapture provision" to override the exemption.[40] Under the "recapture clause," previously exempt ditches are "recaptured," and must comply for the section 404 permitting process for maintenance activities.[41] Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, *etc.*[42] Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

Other districts require entities to include additional data as part of their request for an exemption. One Florida county applied for 18 exemptions at a cost of $600,000 (as part of the exemption request process, the entity must provide data and surveying materials), 3 months later, only two exemptions were granted and the county was still waiting for the other 16 to be granted. At that point, the county was moving into its seasonal rainy season and fielding calls from residents who were concerned about flooding from the ditches.

---

[37] *Id.*
[38] 79 *Fed. Reg.* 22202.
[39] See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).
[40] U.S. Army Corps of Eng'r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).
[41] *Id.*
[42] *Id.* at 4.

This is what is happening to counties now. If the approval process for ditch maintenance exemptions is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety ditches.

It is the responsibility of local governments to ensure the long-term operation and protection of public safety infrastructure. **The Federal Government must address problems within the current CWA Section 404 regulatory framework, to ensure that maintenance activities on public safety infrastructure do not require Federal approval. Without significantly addressing these problems, the Federal agencies will hinder the ability of local governments to protect their citizens.**

Recommendations:

- **Exclude ditches and infrastructure intended for public safety.**
- **Streamline the current section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process.**
- **Provide a clear-cut, national exemption for routine ditch maintenance activities.**

"**Waste Treatment Systems**"—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term "waste treatment" can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that "waste treatment systems,"—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.[43] In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (*i.e.,* green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendation:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA.**

Counties Need Clarity on Stormwater Management and Green Infrastructure Programs

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "*waters of the U.S.*" are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "*waters of the U.S.*"[44] They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "*water of the U.S.*"

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "*waters of the U.S.*" However, EPA has indicated that there could be "*waters of the U.S.*" designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

---

[43] 79 *Fed. Reg.* 22199.
[44] 40 CFR 122.26(b)(8).

MS4s are subject to the CWA and are regulated under section 402 for the treatment of water. However, treatment of water is not allowed in "*waters of the U.S.*" This automatically sets up a conflict if an MS4 contains "*waters of the U.S.*" Would water treatment be allowed in the "*waters of the U.S.*" portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "*waters of the U.S.*" within the state, this may trigger a state's oversight of water quality designations within an MS4. **Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "*waters of the U.S.*" meet designated water quality standards.**

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is *often not funded* as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, *etc.* Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the Federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendation:

- **Explicitly exempt MS4s and green infrastructure from "*waters of the U.S.*" jurisdiction.**

States Responsibilities Under CWA Will Increase

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.[45] Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. State WQS are intended to protect jurisdictional "*waters of the U.S.*," such as rivers, lakes

[45] Cong. Research Serv., *Clean Water Act: A Summary of the Law* (Report RL30030, October 30, 2014), Copeland, Claudia.

and streams, within a state. As part of the WQS process, states must set designated uses for the waterbody (*e.g.,* recreation, drinkable, fishable) and institute Total Maximum Daily Loads (TMDL) for impaired waters.

Currently, WQS regulation focuses on waters regulated under Federal law, however, NACo is concerned the proposed rule may broaden the types of waters considered jurisdictional. This means the states will have to regulate more waters under their WQS and TMDL standards. This would be extremely costly for both the states and localities to implement.

In EPA's and the Corps economic analysis, it states the proposed rule "may increase the coverage where a state would . . . apply its monitoring resources . . . It is not clear that additional cost burdens for TMDL development would result from this action."[46] The data used to come to this conclusion is inconclusive. As discussed earlier, the agencies used data from 2009–2010 field practices for the section 404 program as a basis for the economic analysis. This data is only partially relevant for the CWA Section 404 permit program, it is not easily interchangeable for other CWA programs.

Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "*waters of the U.S.*" As the list of "*waters of the U.S.*" expand, so do state responsibilities for WQS and TMDLs. The effects on state non-point-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

- **NACo recommends that the Federal agencies consult with the states to determine more accuratecosts and implications for the WQS and TMDL programs.**

County Infrastructure on Tribal Lands May Be Jurisdictional

The proposed rule reiterates long-standing policy which says that any water that that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under Federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an "interstate" ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers Federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).[47] Approximately 56.2 million acres of land is held in trust for the tribes[48] and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the Federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation:

- **We request clarification from the Federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the "interstate" definition.**

Endangered Species Act As It Relates to the Proposed Rule

NACo is concerned that provisions of the proposed rule may interact with provisions of the Endangered Species Act (ESA) and its implementing regulations in ways that may produce unintended negative outcomes.

For instance, when a species is proposed for listing as endangered or threatened under ESA, large swaths of land may be designated as critical habitat, that is essen-

---

[46] *Econ. Analysis of Proposed Revised Definition of* ***Waters of the United States,*** U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), (March 2014) at 6–7.

[47] U.S. Dept. of the Interior, Indian Affairs, *What We Do,* available at *http://www.bia.gov/WhatWeDo/index.htm*.

[48] *Id.*

tial to the species' protection and recovery. Critical habitat requires special management and conservation, which can have enormous economic impacts oncounty governments and private landowners.

This effect is intensified when the section 404 permit program is triggered. Section 7 consultation under the ESA could be required, which can be time-consuming and expensive, especially for public safety projects. Some counties are already reporting strict ESA requirements on maintenance of public safety ditches.

To further compound the issue, the vague terms used in the proposed rule such as "floodplains," may also trigger ESA compliance. In recent years, the Federal Emergency Management Agency (FEMA) has been sued for not considering the habitat needs of threatened and endangered species in National Flood Insurance Program (NFIP) floodplain designations. Local governments in certain states, who participate in the NFIP, must now certify they will address ESA critical habitat issues in floodplain areas. **This litigation-driven approach circumvents local land use planning authority and creates an atmosphere of mistrust rather than providing incentives to counties and private landowners to actively engage in endangered species conservation.**

If the agencies plan to use broad definitions within the proposed rule, regulation by litigation would seem to be an increasingly likely outcome. These issues need to be carefully considered by the agencies.

Ensuring that Local Governments Are Able to Quickly Recover from Disasters

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.[49]

Counties in the Gulf Coast states and the Mid-West have reported challenges in receiving emergency waivers for debris in ditches designated as "*waters of the U.S.*" after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "*waters of the U.S.*"

Conclusion

We appreciate the opportunity to be a part of this process. NACo acknowledges the efforts taken by both EPA and the Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As stated earlier, we believe that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal. This is problematic because counties are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches. Furthermore, the unknown impacts on other CWA programs are equally problematic, the degree and cost of regulation will increase dramatically if these features are redefined as "*waters of the U.S.*" **We urge you to withdraw the rule until further study on the potential impacts are addressed.**

We look forward to working together with our Federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at [*Jufner@naco.org*] or [202.942.4269].

Sincerely,

MATTHEW D. CHASE,
Executive Director,
National Association of Counties.

ATTACHMENT 2

November 14, 2014

[49] *Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong.* (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

DONNA DOWNING,
Jurisdiction Team Leader, Wetlands Division,
U.S. Environmental Protection Agency,
Washington, D.C.;

STACEY JENSEN,
Regulatory Community of Practice
U.S. Army Corps of Engineers,
Washington, D.C.

RE: Proposed Rule on "Definition of '*Waters of the United States*' Under the Clean Water Act," Docket No. EPA–HQ–OW–2011–0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule on "*Definition of '**Waters of the United States**' Under the Clean Water Act.*" We thank the agencies for educating our members on the proposal and for extending the public comment period in order to give our members additional time to analyze the proposal. We thank the agencies in advance for continued opportunities to discuss these, and other, important issues.

The health, well-being and safety of our citizens and communities are top priorities for us. To that end, it is important that Federal, state and local governments all work together to craft reasonable and practicable rules and regulations. As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact that a change to the definition of "*waters of the U.S.*" will have on all aspects of the Clean Water Act (CWA). That is why several of our organizations and other state and local government partners asked for a transparent and straight-forward rulemaking process, inclusive of a federalism consultation process, rather than having changes of such a complex nature instituted though a guidance document alone.

As described below, we have a number of overarching concerns with the rulemaking process, as well as specific concerns regarding the proposed rule. In light of both, we have the following requests:

1. We strongly urge EPA and the Corps to modify the proposed rule by addressing our concerns and incorporating our suggestions to provide greater certainty and clarity for local governments; and
2. We ask that EPA and the Corps issue a revised proposed rule with an additional comment period, so that we can be certain these concerns are adequately addressed; or
3. Alternatively, if an additional comment period is not granted, we respectfully call for the withdrawal of this proposed rule and ask the agencies to resubmit a proposed rule at a later date that addresses our concerns.

Overarching Concerns with the Rulemaking Process

While we appreciate the willingness of EPA and the Corps to engage state and local government organizations in a voluntary consultation process prior to the proposed rule's publication, we remain concerned that the direct and indirect impacts of the proposed rule on state and local governments have not been thoroughly examined because three key opportunities that would have provided a greater understanding of these impacts were missed:

1. Additional analysis under the Regulatory Flexibility Act, which examines economic impacts on small entities, including cities and counties;
2. State and local government consultation under Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns; and
3. The agencies' economic analysis of the proposed rule, which did not thoroughly examine impacts beyond the CWA 404 permit program and relied on incomplete and inadequate data.

Additionally, we believe there needs to be an opportunity for intergovernmental state and local partners to thoroughly read the yet-to-be-released final connectivity report, synthesize the information, and incorporate those suggestions into their public comments on the proposed rule. These missed opportunities and our concerns regarding the connectivity report are discussed in greater detail below.

1. The **Regulatory Flexibility Act (RFA)** requires Federal agencies that promulgate rules to consider the impact of their proposed rule on small entities, which under the definition includes cities, counties, school districts, and special districts of less than 50,000 people. RFA, as amended by the Small Busi-

ness Regulatory Enforcement Fairness Act, requires agencies to make available, at the time the proposed rule is published, an initial regulatory flexibility analysis on how the proposed rule impacts these small entities. The analysis must certify that the rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). The RFA SISNOSE process allows Federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. The RFA process was not undertaken for this rule.

Based on analysis by our cities and counties, the proposed rule will have a significant impact on all local governments, but on small communities particularly. Most of our nation's cities and counties—more than 18,000 cities and 2,000 counties—have populations less than 50,000. The RFA SISNOSE analysis would be of significant value to these governments.

2. **Executive Order 13132: Federalism** requires Federal agencies to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that a change in the definition of "*waters of the U.S.*" imposes only indirect costs, the agencies state that the proposed rule does not trigger Federalism considerations. We wholeheartedly disagree with this conclusion and are convinced there will be both direct and indirect costs for implementation.

   Additionally, while EPA initiated a Federalism consultation for its state and local partners in 2011, the process was prematurely shortened. In the 17 months between the initial Federalism consultation and the publication of the proposed rule, the agencies changed directions several times (regulation *versus* guidance). In those intervening 17 months between the consultation and the publication of the proposed rule, the agencies failed to continue substantial discussions, thereby not fulfilling the intent of Executive Order 13132.

3. The ***Economic Analysis of Proposed Revised Definition of Waters of the U.S.*** is flawed because it does not include a full analysis of the proposed rule's impact on all CWA programs beyond the 404 program (including the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, and Spill Prevention, Control and Countermeasure (SPCC) programs). Since a number of these CWA programs directly affect state and local governments, it is imperative the analysis provide a more comprehensive review of the actual costs and consequences of the proposed rule on these programs.

   Moreover, we remain concerned that the data used in the analysis is insufficient. The economic analysis used 2009–2010 data of section 404 permit applications as a basis for examining the impacts of the proposed rule on all CWA programs. It is insufficient to compare data from the section 404 permit program and speculate to the potential impacts to other CWA programs. Additionally, 2009–2010 was at the height of the recession when development (and other types of projects) was at an all-time low. The poor sample period and limited data creates uncertainty in the analysis's conclusions.

In addition to the missed opportunities, we are concerned about the timing of the yet-to-be-finalized *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report, which will serve as the scientific basis for the proposed rule. In mid-October, EPA's Science Advisory Board (SAB), which was tasked with reviewing the document, sent a letter with detailed recommendations on how to modify the report. The SAB raised important questions about the scope of connectivity in their recommendations, which will need to be addressed prior to finalizing the report. We recommend EPA and the Corps pause this rulemaking effort until after the connectivity report is finalized to allow the public an opportunity to comment on the proposed rule in relation to the final report.

In a November 8, 2013 letter from the U.S. Conference of Mayors, National League of Cities and National Association of Counties to the Office and Management and Budget Administrator, we highlight the various correspondences our associations have submitted since 2011 as part of the guidance and rulemaking consideration process. (See attached.) We share this with you to demonstrate that we have been consistent in our request for a federalism consultation, concerns regarding the cost-benefit analysis, and concerns about the process and scope of the rulemaking. With these comments, we renew those requests.

Requests:

- Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act.
- Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism to address local government concerns and issues of clarity and certainty.
- Perform a thorough economic analysis inclusive of an examination of impacts of the proposed rule on all CWA programs using deeper and more relevant data. We urge the agencies to interact with issue-specific national associations to collect these data sets.
- Reopen the comment period for the proposed rule once the connectivity report is finalized for a minimum of 60 days.

Specific Concerns Regarding the Proposed Rule

As currently drafted, there are many examples where the language of the proposed rule is ambiguous and would create more confusion, not less, for local governments and ultimately for agency field staff responsible for making jurisdictional determinations. Overall, this lack of clarity and uncertainty within the language opens the door unfairly to litigation and citizen suits against local governments. To avoid such scenarios, setting a clear definition and understanding of what constitutes a "*waters of the U.S.*" is critical. We urge you to consider the following concerns and recommendations in any future proposed rule or final rule.

Key Definitions

Key terms used in the proposed rule such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" will be used to define what waters are jurisdictional under the proposed rule. However, since these terms are either broadly defined, or not defined at all, this will lead to further confusion over what waters fall under Federal jurisdiction, not less as the proposed rule aims to accomplish. The lack of clarity will lead to unnecessary project delays, added costs to local governments and inconsistency across the country.

Request:

- Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations.

Public Safety Ditches

While EPA and the Corps have publicly stated the proposed rule will not increase jurisdiction over ditches, based on current regulatory practices and the vague definitions in the proposed rule, we remain concerned.

Under the current regulatory program, ditches are regulated under CWA Section 404, both for construction and maintenance activities. There are a number of challenges under the current program that would be worsened by the proposed rule. For example, across the country, public safety ditches, both wet and dry, are being regulated under section 404. While an exemption exists for ditch maintenance, Corps districts inconsistently apply it nationally. In some areas, local governments have a clear exemption, but in other areas, local governments must apply for a ditch maintenance exemption permit and provide surveys and data as part of the maintenance exemption request.

Beyond the inconsistency, many local governments have expressed concerns that the section 404 permit process is time-consuming, cumbersome and expensive. Local governments are responsible for public safety; they own and manage a wide variety of public safety ditches—road, drainage, stormwater conveyances and others—that are used to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is liable for maintaining the integrity of their ditches, even if Federal permits are not approved by the Federal agencies in a timely manner. In *Arreola* v. *Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey, California liable for not maintaining a levee that failed due to overgrowth of vegetation.

The proposed rule does little to resolve the issues of uncertainty and inconsistency with the current exemption language or the amount of time, energy and money that is involved in obtaining a section 404 permit or an exemption for a public safety ditch. The exemption for ditches in the proposed rule is so narrowly drawn that any city or county would be hard-pressed to claim the exemption. It is hard—if not impossible—to prove that a ditch is excavated wholly in uplands, drains only uplands and has less than perennial flow.

Request:

- Provide a specific exemption for public safety ditches from the "*waters of the U.S.*" definition.

Stormwater Permits and MS4s

Under the NPDES program, all facilities which discharge pollutants from any point source into a "*waters of the U.S.*" are required to obtain a permit, including local governments with Municipal Separate Storm Sewer Systems (MS4s). Some cities and counties own MS4 infrastructure that flow into a "*waters of the U.S.*" and are therefore regulated under the CWA Section 402 stormwater permit program. These waters, however, are not treated as jurisdictional waters since the nature of stormwater makes it impossible to regulate these features.

It is this distinction that creates a conflict between the stormwater program and the definition of "*waters of the U.S.*" in the proposed rule and opens the door to citizen suits. Water conveyances including but not limited to MS4s that are purposed for and servicing public use are essentially a series of open ditches, channels and pipes designed to funnel or to treat stormwater runoff before it enters into a "*waters of the U.S.*" However, under the proposed rule, these systems could meet the definition of a "tributary," and thus be jurisdictional as a "*waters of the U.S.*" The language in the proposed rule must be clarified because a water conveyance cannot both treat water and prevent untreated water from entering the system.

Additionally, waterbodies that are considered a "*waters of the U.S.*" are subject to state water quality standards and total maximum daily loads, which are inappropriate for this purpose. Applying water quality standards and total maximum daily loads to stormwater systems would mean that not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. This, again, creates a conflict between the stormwater program and the definition of "*waters of the U.S.*" in the proposed rule.

Request:

- Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "*waters of the U.S.*" definition.

Waste Treatment Exemption

The proposed rule provides that "waste treatment systems, including treatment ponds or lagoons, *designed to meet the requirements of the Clean Water Act*" (emphasis added) are not "*waters of the U.S.*" In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from the CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may inadvertently fall under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (*i.e.,* green infrastructure) and artificially constructed groundwater recharge basins. Therefore, we ask the agencies to specifically include green infrastructure techniques and water delivery and reuse facilities under this exemption.

A. Green Infrastructure

With the encouragement of EPA, local governments across the country are utilizing green infrastructure techniques as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. These more beneficial and aesthetically pleasing features, which include existing stormwater treatment systems and low impact development stormwater treatment systems, are not explicitly exempt under the proposed rule. Therefore, these sites could be inadvertently impacted and require section 404 permits for green infrastructure construction projects if they are determined to be jurisdictional under the new definitions in the proposed rule.

Additionally, it is unclear under the proposed rule whether a section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. Moreover, if these features are defined as "*waters of the U.S.*," they would be subject to all other sections of the CWA, including monitoring, attainment of water quality standards, controlling and permitting all discharges in these features, which would be costly and problematic for local governments.

Because of the multiple benefits of green infrastructure and the incentives that EPA and other Federal agencies provide for local governments to adopt and construct green infrastructure techniques, it is ill-conceived to hamper

local efforts by subjecting them to 404 permits or the other requirements that would come with being considered a "*waters of the U.S.*"

B. Water Delivery and Reuse Facilities

Across the country, and particularly in the arid west, water supply systems depend on open canals to convey water. Under the proposed rule, these canals would be considered "tributaries." Water reuse facilities include ditches, canals and basins, and are often adjacent to jurisdictional waters. These features would also be "*waters of the U.S.*" and as such subject to regulation and management that would not only be unnecessarily costly, but discourage water reuse entirely. Together, these facilities serve essential purposes in the process of waste treatment and should be exempt under the proposed rule.

Requests:

- Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption.
- Expand the waste treatment exemption to include systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA.
- Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "*waters of the U.S.*" definition.

NPDES Pesticide Permit Program

Local governments use pesticides and herbicides in public safety infrastructure to control weeds, prevent breeding of mosquitos and other pests, and limit the spread of invasive species. While the permit has general requirements, more stringent monitoring and paperwork requirements are triggered if more than 6,400 acres are impacted in a calendar year. For local governments who have huge swathes of land, the acreage limit can be quickly triggered. The acreage limit also becomes problematic as more waterbodies are designated as a "*waters of the U.S.*"

Additional Considerations

Finally, we would like to offer two additional considerations that would help to resolve any outstanding confusion or disagreement over the breath of the proposed rule and assist local governments in meeting our mutual goals of protecting water resources and ensuring public safety.

Appeals Process

Many of the definitions in the proposed rule are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency jurisdictional determinations without having to go to court.

Request:

- Institute a straight-forward and transparent process for entities to appeal agency jurisdictional determinations.

Emergency Exemptions

In the past several years, local governments who have experienced natural or man-made disasters have expressed difficulty obtaining emergency clean-up waivers for ditches and other conveyances. This, in turn, endangers public health and safety and jeopardizes habitats. We urge the EPA and the Corps to revisit that policy, especially as more waters are classified as "*waters of the U.S.*" under the proposed rule.

Request:

- Set clear national guidance for quick approval of emergency exemptions.

Conclusion

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we thank you for the opportunity to comment on the proposed rule. Changing the CWA definition of "*waters of the U.S.*" will have far-reaching impacts on our various constituencies.

As local governments and associated agencies, we are charged with protecting the environment and protecting public safety. We play a strong role in CWA implementation and are key partners in its enactment; clean and safe drinking water is essential for our survival. We take these responsibilities seriously.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact the proposed "*wa-*

ters of the U.S." rule will have on our local communities. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

TOM COCHRAN,
CEO and Executive Director,
The U.S. Conference of Mayors;

CLARENCE E. ANTHONY,
Executive Director,
National League of Cities;

MATTHEW D. CHASE,
Executive Director,
National Association of Counties;

JOANNA L. TURNER,
Executive Director,
National Association of Regional Councils;

BRIAN ROBERTS,
Executive Director,
National Association of County Engineers;

PETER B. KING,
Executive Director,
American Public Works Association;

SUSAN GILSON,
Executive Director,
National Association of Flood and Stormwater Management Agencies.

ATTACHMENT

November 8, 2013

Hon. HONORABLE HOWARD SHELANSKI,
Administrator, Office of Information and Regulatory Affairs,
Office of Management and Budget,
Washington D.C.

RE: EPA's Definition of "*Waters of the U.S.*" Under the Clean Water Act Proposed Rule and Connectivity Report (Docket ID No. EPA–HQ–OA–2013–0582)

Dear Administrator Shelanski:

On behalf of the nation's mayors, cities and counties, we are writing regarding the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rulemaking to change the Clean Water Act definition of "*Waters of the U.S.*" and the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* which EPA indicated will serve as a basis for the rulemaking. We appreciate that EPA and the Corps are moving forward with a rule under the Administrative Procedures Act, as our organizations previously requested, however, we have concerns about the process and the scope of the rulemaking.

Background

In May 2011, EPA and the Corps released Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance) to help determine whether a waterway, water body or wetland would be jurisdictional under the Clean Water Act (CWA).

In July 2011, our organizations submitted comments on the Draft Guidance, requesting that EPA and the Corps move forward with a rulemaking process that features an open and transparent means of proposing and establishing regulations and ensures that state, local, and private entity concerns are fully considered and properly addressed. Additionally, our joint comments raised concerns with the fact that the Draft Guidance failed to consider the effects of the proposed changes on all CWA programs beyond the 404 permit program, such as Total Maximum Daily Load (TMDL) and water quality standards programs and the National Pollutant Discharge Elimination System (NPDES) permit program.

In response to these comments, EPA indicated that it would not move forward with the Draft Guidance, but rather a rulemaking pertaining to the "*Waters of the U.S.*" definition. In November 2011, EPA and the Corps initiated a formal federalism consultation process with state and local government organizations. Our organizations submitted comments on the federalism consultation briefing in December 2011. In early 2012, however, EPA changed course, putting the rulemaking on

ber 2011. In early 2012, however, EPA changed course, putting the rulemaking on hold and sent a final guidance document to the Office of Management and Budget (OMB) for interagency review. Our organizations submitted a letter to OMB in March 2012 repeating our concerns with the agencies moving forward with a guidance document.

Most recently, in September 2013, EPA and the Corps changed course again and withdrew the Draft Guidance and sent a draft "*Waters of the U.S.*" rule to OMB for review. At the same time, the agencies released a draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Concerns

While we acknowledge the federalism consultation process that EPA and the Corps began in 2011, in light of the time that has passed and the most recent developments in the process toward clarifying the jurisdiction of the CWA, we request that EPA and the Corps hold a briefing for state and local governments groups on the differences between the Draft Guidance and the propose rule that was sent to OMB in September. Additionally, if EPA and the Corps have since completed a full cost analysis of the proposed rule on all CWA programs beyond the 404 permit program, as our organizations requested, we ask for a briefing on these findings.

In addition to our aforementioned concerns, we have a new concern with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* and how it fits into the proposed "*Waters of the U.S.*" rulemaking process, especially since the document will be used as a basis to claim Federal jurisdiction over certain water bodies. By releasing the draft report for public comment at the same time as a proposed rule was sent to OMB for review, we believe EPA and the Corps have missed the opportunity to review any comments or concerns that may be raised on the draft science report actually inform the development of the proposed rule. We ask that OMB remand the proposed rule back to EPA and the Corps and that the agencies refrain from developing a proposed rule until after the agencies have thoroughly reviewed comments on the draft science report.

While you consider our requests for additional briefings on this important rulemaking process and material, we also respectfully request additional time to review the draft science report. We believe that 44 days allotted for review is insufficient given the report's technical nature and potential ramifications on other policy matters.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast affect that a change to the definition of "*Waters of the U.S.*" will have on all aspects of the CWA. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,



TOM COCHRAN,
CEO and Executive Director,
The U.S. Conference of Mayors;

CLARENCE E. ANTHONY,
Executive Director,
National League of Cities;

MATTHEW D. CHASE,
Executive Director,
National Association of Counties;

CC:

GINA MCCARTHY, *Administrator,* U.S. Environmental Protection Agency;
Lt. General THOMAS P. BOSTICK, *Commanding General and Chief of Engineers,* Army Corps of Engineers.

ATTACHMENT 3

November 11, 2014

DONNA DOWNING,
Jurisdiction Team Leader, Wetlands Division,
U.S. Environmental Protection Agency,
Washington, D.C.;

STACEY JENSEN,
Regulatory Community of Practice,
U.S. Army Corps of Engineers,
Washington, D.C.

RE: Proposed Rule on "Definition of '*Waters of the United States*' Under the Clean Water Act," Docket No. EPA–HQ–OW–2011–0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the County Commissioners Association of Pennsylvania, representing all 67 counties in the commonwealth, I write to ask the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) to withdraw the proposed rulemaking for the on the definition of "'*Waters of the United States*' under the Clean Water Act," as published in the *Federal Register* on April 21, 2014, and to amend the rule only after consideration of the comments received, and with a better understanding of existing state programs.

In Pennsylvania, there are more than 86,000 miles of waterways, from major rivers to local streams and creeks, to large lakes and small ponds. This commonwealth has a long history of taking our duty to protect water quality seriously. Our state Clean Streams Law, which is older than the Federal Clean Water Act, clearly protects all waters of the commonwealth from pollution or potential pollution. Over the years, we have developed a strong set of regulations and permitting programs that are specific to Pennsylvania's needs. In addition, counties and conservation districts make critical front-line decisions related to many aspects of waterway planning and management, including stormwater management, flood mitigation and maintenance of dams and levees. We are familiar with the local environmental issues because we are on the ground in our counties every day, providing local response and oversight.

However, a complex web of laws, regulations and policies has made it increasingly difficult, less efficient and more costly for counties to undertake needed waterway infrastructure projects such as dams and levees, and stormwater management. These projects are critical elements of public health and safety, helping to manage flooding events, assuring water quality and promoting sustainable land use and community development. As a priority for this year, Pennsylvania's counties are encouraging a review of current Federal and state laws and regulations with a goal of promoting more effective policies and procedures.

The confusing *Waters of the U.S.* definition proposed by EPA and Army Corps goes in the entirely opposite direction of this goal, tangling the web further rather than facilitating more efficient delivery of environmental programs. We are very concerned that, despite the assertions of the EPA and Army Corps to the contrary, the proposed rule would modify and expand existing regulations which have been in place for over 25 years. For Pennsylvania, because of the strong tradition of state and local oversight that has been in place for decades, subjecting more waters to Federal jurisdiction represents only a paper fix, increasing the paperwork, time and cost for acquiring additional Federal permits without any actual improvement to water quality.

Pennsylvania's Clean Streams Law

Presentations made by the EPA have indicated that the proposed rule will help states protect their waters because ⅔ of the nation's states rely on the Federal definition. However, other states, including Pennsylvania, apply jurisdiction to "waters of the state," which must be as inclusive as "*waters of the U.S.*" but may be more inclusive. Pennsylvania's Clean Streams Law, enacted prior to the Federal Clean Water Act, includes a definition of "waters of the commonwealth" which protects all of the state's "rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries" of the commonwealth. This statute also provides the foundation of delegation to the Pennsylvania Department of Environmental Protection (DEP) of the National Pollution Discharge Elimination System (NPDES) program under section 402 of the Clean Water Act.

While the Clean Streams Law is the principal governing statute regarding Pennsylvania's water quality, other state statutes addressing water quality and control include the Dam Safety and Encroachment Act (Act 325 of 1978), the Flood Plain Management Act (Act 166 of 1978), the Sewage Facilities Act (Act 537 of 1965), the Storm Water Management Act (Act 167 of 1978), the Water Resources Planning Act (Act 220 of 2002) and the Nutrient Management Act (Act 38 of 2005, replacing Act 6 of 1993). Under these laws, Pennsylvania has developed comprehensive regulations and an extensive permitting system to assure our water quality remains at the highest levels. In addition, our definition of "waters of the commonwealth" already covers the types of waters it appears the EPA and Army Corps are seeking jurisdiction over in the proposed *Waters of the U.S.* rule.

Despite these extensive protections already in place, EPA has continued to heavily rely on a 2013 Environmental Law Institute study, *State Constraints—State-Im-*

posed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. This study, referenced in the background information supporting the rulemaking (though not in the rulemaking itself), fails to identify Pennsylvania's state statutes and regulations; in fact, there is no mention of the Clean Streams Law at all. Instead, the study proposes that the *Waters of the U.S.* rulemaking is needed to address states' regulatory loopholes, including Pennsylvania. Given that the background to the proposed rule states, "This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources . . . under the CWA," we would hope that the EPA and Army Corps would withdraw this rule until such time as it has a better, and more accurate, understanding of existing state laws, regulations and programs developed pursuant to that primary responsibility.

Since it seems likely that the proposed *Waters of the U.S.* definition would expand the scope of waters under Federal jurisdiction (as discussed below), this means new permits would be required for activities and waters that are already regulated under state law. In addition to the cost and time associated with preparing and filing these applications, many entities report that it is at least a 30 day wait for approval of a nationwide permit, as many as 60 days for approval of an isolated permit and up to 180 days or longer for an individual permit. If these permits are required for activities that are traditionally just routine maintenance, the expansion of jurisdiction creates a bureaucratic mess for what should be a simple task.

Further, states are required to expand their current water quality designations to protect jurisdictional waters, increasing reporting and attainment standards at the state level. Section 305(b) of the Clean Water Act requires a report from states that includes (among other items) a description of the water quality of all navigable waters in the state and an analysis of the extent to which they meet the 101(a)(2) goals of the Act. Any increase to do these surveys and reports (and to what gain?) will also create a cost for local governments as resources are used for these purposes rather than for on-the-ground projects that actually benefit water quality.

Again, the expansion of Federal jurisdiction over waters, as interpreted in this proposed rule, would do nothing to better protect Pennsylvania's water resources, only create more paperwork, make permitting processes more costly and more time consuming—and ultimately, undermine the good work we have been doing in this state for decades.

State and Local Oversight

In addition to the oversight provided by the state's DEP, under the Pennsylvania Conservation District Law (Act 217 of 1945), all counties except Philadelphia were authorized to create a county conservation district "as a primary local government unit responsible for the conservation of natural resources in this Commonwealth and to be responsible for implementing programs, projects and activities to quantify, prevent and control non-point sources of pollution" (Section 2). County conservation districts bring a local perspective to balancing environmental protection with growth, including local geologic and topographic knowledge. In addition, their knowledge and experience of the issues in their communities lead to better management of resources, targeted technical assistance, educational guidance to landowners on matters such as reducing soil erosion, stormwater management, dirt and gravel road pollution prevention, protection of water quality and prevention of hazardous situations such as floods.

The 66 districts also accept delegation agreements with DEP and the State Conservation Commission to implement nutrient management, permitting processes, wetland management, bridges, and erosion and sedimentation controls. The districts have three options—basic education, technical assistance (non-enforcement) and enforcement; twelve districts are enforcement districts. Conservation districts also cooperate with DEP regarding spraying for black fly populations along affected streams, and have been actively engaged in the development and implementation of Pennsylvania's Chesapeake Bay Watershed Implementation Plan to help meet the Total Maximum Daily Load (TMDL) goals set by the EPA.

Again, since the proposed *Waters of the U.S.* definition appears to expand the scope of waters under Federal jurisdiction (as discussed below), it follows that EPA and Army Corps would have additional oversight responsibilities for those waters, undermining our successful model of local oversight. Not only is this duplicative, but this additional layer of permitting would be reviewed and approved by staff at EPA's regional offices, which cover several states. With such an expansive territory, it is far more difficult for EPA regional staff to be active regularly in the communities for which they work and to have the "boots on the ground" that can help develop solutions.

We urge the EPA and Army Corp to include counties in all decision-making processes as they develop new regulations and programs that will affect waterway infrastructure, including withdrawal of the currently proposed *Waters of the U.S.* definition until such local input can be considered. This way, counties may remain fully engaged as the foundation for local conservation and environmental problem-solving efforts.

Proposed Definition of "*Waters of the U.S.*"

The proposed *Waters of the U.S.* (hereafter referred to as WOTUS) definition would modify existing regulations regarding which waters fall under Federal jurisdiction through the Clean Water Act. Its purpose is to clarify issues raised in U.S. Supreme Court decisions over the past decade or so that have created uncertainty over the scope of CWA jurisdiction. The newly proposed rule attempts to resolve this confusion by broadening the geographic scope of Clean Water Act jurisdiction, defining WOTUS under Federal jurisdiction to include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands and "other waters." It also redefines or contains new definitions for key terms, such as adjacency, riparian area and flood plain.

While EPA and Army Corp claim that the intention is to provide more regulatory certainty for land developers, farmers and other businesses, the language used only results in additional confusion. A good regulation would be clear, so everyone—both regulator and regulated—knows what is allowed and when a permit is required. Instead, the key terms used by the proposed WOTUS definition are inadequately explained, even less clear than current law and raise important questions. Because the proposed definitions are vague, the only certainty is that this matter will be tied up in the courts and projects unnecessarily delayed for years to come, creating additional doubt within industries and communities across the state and assuring resources are devoted to administrative and legal burdens rather than actually protecting water quality.

The agencies further claim that the proposed rule is based on the best available science, yet they acknowledge that the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer-review scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters. The final connectivity report as of the submission of these comments, just days before the public comment deadline, has not yet been released, giving the public no opportunity to review it in conjunction with the language of the proposed rule. If the proposed rule is going to be revised based on the final connectivity report, will there be another public comment period once the rule is revised based on that data?

The EPA and Army Corps have indicated that the proposed WOTUS rule creates "bright line categories" of waters that are and are not jurisdictional. However, the definition's reliance on the interconnectivity of waters in reality dulls this line, and the definition is so vague, it is difficult to tell where Federal jurisdiction would actually end. The proposed regulation further claims to have a goal of greater predictability and consistency through increased clarity, but at the same it emphasizes "the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw." With all of these factors in play, how is it possible to draw a black and white line to determine jurisdiction?

This concern is highlighted by the Oct. 17 release by EPA's Science Advisory Board Panel (SAB) of its review of the agency's draft connectivity report. The more than 100 page SAB review agrees with EPA's assessment that streams and wetlands are connected with larger water bodies such as rivers, lakes, estuaries and oceans, but also suggests that these "connections should be considered in terms of a connectivity gradient," highlighting the difficulty in determining "bright line jurisdiction." For this and many other reasons, the EPA and Army Corps would be well served to withdraw the proposed rule until the connectivity report has been finalized. Otherwise, the agencies may be missing a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

The terminology and definitions used serve to illustrate how difficulty it will be to determine what jurisdiction Federal agencies have under the proposed rule. One of the more ambiguous terms defined within the proposed rule is that of "significant nexus," a term which is to be used to determine jurisdictional waters on a case-by-case basis. This single term would essentially grant EPA and Army Corps jurisdiction over virtually all waters and connecting lands, because in reality, there is al-

most nothing from a hydrological standpoint that is not somehow connected or is not significant within the hydrologic cycle. This is a point the regulation seems to concede repeatedly as it refers to the important role of tributaries and adjacent waters in maintaining the chemical, physical and biological integrity of traditional navigable waters, interstate waters and the territorial seas, and by insisting that the effects of small water bodies in a watershed need to be considered in the aggregate. In addition, the proposed rule even indicates that a water body could in fact have a significant nexus *without* a hydrologic connection because it has a "functional relationship" with the traditional navigable water, interstate water or territorial sea, such as retention of flood waters or other pollutants that would otherwise flow downstream. In the alternative, attributes that may not be jurisdictional by themselves may be when considered in combination for the significant nexus test, and waters near a WOTUS could also be jurisdictional *without* a significant nexus if they are in the floodplain or a riparian area.

Despite the insistence of the EPA and Army Corps that the proposed rule does not expand the waters over which the agencies have jurisdiction, the reliance on this one term alone begs to differ. If there are waters the agencies do not intend to have jurisdiction over in this rule, that intention should be explicitly spelled out with clearer definitions and terminology.

Further, the Clean Water Act protects the chemical, physical and biological integrity of the nation's waters. Generally, the three terms have always been considered together. However, throughout the proposed rule, and specifically in the term "significant nexus," the terms are grouped differently—sometimes they are linked by an "and" (chemical, physical *and* biological) and sometimes they are linked by an "or" (chemical, physical *or* biological). How the terms are linked will have a huge impact on how this regulation is enforced, because it means the difference between whether all three must be present to create a significant nexus, or merely any one of the three. Why were the changes made and where will these changes have the biggest impact?

Similar uncertainty rests with the way "waters in the region" and "watershed" are used to determine a significant nexus, as it appears the two are being used interchangeably throughout the explanation. While the definition of "significant nexus" notes that a region of similarly situated waters could be the watershed that drains to the nearest traditional navigable water, interstate water or territorial sea, this reference to watersheds is included as an "*i.e.,*" implying that the proposed rule could also be open to other interpretations of "region." Further, the definition of "significant nexus" also refers to the ability of other waters to be evaluated as a "single landscape unit"—is this different than a region or a watershed, and if so, how?

It is also not clear what level of watershed the agencies intend to use to determine a significant nexus. For instance, Pennsylvania has six major watersheds—the Ohio, the Genesee, the Susquehanna, the Delaware, the Erie and the Potomac. The Chesapeake Bay watershed is also demarcated within commonwealth borders, and more than 50 percent of the state's land drains to the Bay. Yet within each of these watersheds, the individual watersheds of smaller creeks and rivers have also been determined and are outlined in the Pennsylvania State Water Plan. By way of example, the State Plan designates four watersheds within York County (a county in south-central Pennsylvania bordering the Susquehanna River), which have been further divided into nine sub-watersheds for stormwater management and Rivers Conservation Plan purposes. Which level of watershed, or region, is purported to be the one that will determine the relationship or significant nexus to the nearest traditional navigable water, interstate water or territorial sea?

Other terminology used throughout the proposed rule only adds to the confusion about which waters will be considered to be *Waters of the U.S.* For instance, one of the supposed bright-line categories of jurisdiction is a water that is "adjacent" to a traditional navigable water, interstate water or territorial sea. Yet the definition of "adjacent" contains even more vague terms—bordering, contiguous or neighboring, the latter of which leads us to the floodplain or riparian area of a jurisdictional water. There are further references to "aquatic systems" incorporating navigable waters. As we have noted previously, all of these terms only highlight the interdependence of hydrological systems and implies that virtually every water has a nexus in some way to a traditional navigable water, interstate water or territorial sea. The proposed rule should be considerably clearer on which waters will be considered in the aggregate.

Practical Examples

CCAP shares several real world examples of the far-reaching impact of the proposed *Waters of the U.S.* rule.

Ditches: Roadside ditches common in rural areas could be brought under CWA regulation if they are determined to either flow to navigable waters (tributary) or are considered "adjacent" to a "water of the U.S." or have a "significant nexus" to those waters, which would require a specific case-by-case determination by the agencies. These ditches typically do not have perennial flow and should be considered exempt from CWA jurisdiction. If they are not clearly exempted and are thus considered "*waters of the U.S.*", more of these ditches will likely fall under Federal jurisdiction and certain maintenance activities might require a CWA Section 404 permit.

In recent years, section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under Federal jurisdiction, this permit process can be extremely cumbersome, time-consuming and expensive. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The Federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, creating legal vulnerabilities for communities that are responsible for maintaining these ditches, even if the Federal permit is not approved in a timely manner. For example, in 2002, in *Arreola* v. *Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey in California liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the County argued that the Corps permit process did not allow for timely approvals.

Further, a ditch in a backyard or a swail could arguably be jurisdictional by the definition of "adjacent" or "significant nexus", if it rains and the resulting water flow runs downhill to a stream. If a homeowner fills that ditch or swail in without a Federal permit, what happens? Is that homeowner then subject to the extensive penalties found in the CWA, even if that individual met all other state and local permitting obligations intended to assure water quality is adequately protected?

Floodplain management: With thousands of miles of waterways in Pennsylvania, the ability to manage flood waters is critical, and there are concerns over how this proposed rule may impact counties' public disaster response, mitigation and recovery processes with an unforeseen additional regulatory process. Many communities have public infrastructure to funnel water away from low-lying roads, properties and businesses. In recent years, our state has seen several major storms wreak havoc, such as Tropical Storm Lee and Hurricane Irene in the fall of 2011, which have taken substantial time and resources from which to recover. Combined with the impacts of rising flood insurance costs, the commonwealth's counties seek to do as much as they can to implement mitigation projects and encourage municipalities to participate in the Community Rating System under the National Flood Insurance Program by undertaking a comprehensive approach to floodplain management. As with every other aspect of governance, though, there are limited resources for such efforts and time is of the essence since the next big flooding event could occur at any time. Counties want to use the time and funding they have in the most effective way possible, but adding confusion and bureaucratic burdens to these waterway projects only makes it harder to take action that will keep our citizens out of harm's way.

Stormwater/MS4s: Since stormwater activities are not explicitly exempt under the proposed rule, concerns have been raised that Municipal Separate Storm Sewer System (MS4) ditches could now be classified as a "*Water of the U.S.*" Some counties and cities own MS4 infrastructure including ditches, channels, pipes and gutters that flow into a "*water of the U.S.*" and are therefore regulated under the CWA Section 402 stormwater permit program. In various conference calls and meetings, the agencies have stressed that MS4s will not be regulated as "*waters of the U.S.*" But since MS4s are essentially a series of ditches, pipes, and channels—all of which could fall under the tributary and adjacency definition—MS4s could easily be interpreted to be "*waters of the U.S.*" This is a significant potential threat for local governments that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. And even if it is not the intent of the agencies to regulate MS4s, vague Federal rules have been used by various outside groups to litigate for years, which may ultimately force the agencies to regulate MS4s unless they are explicitly exempted from the requirements.

In addition, green infrastructure is not explicitly exempt under the proposed rule. A number of local governments are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes. The proposed rule could inadvertently impact a number of

these county-maintained sites by requiring section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it is unclear under the proposed rule whether a section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

Chesapeake Bay TMDL: More than 50 percent of the land (more than 14 million acres) in Pennsylvania drains to the Chesapeake Bay, currently subject to Total Maximum Daily Load (TMDL) requirements as established by the EPA in 2010 pursuant to section 303 of the Clean Water Act. The TMDL requirements set limits for the amount of nitrogen, phosphorus and sediment runoff into the Bay and its tidal tributaries, both from point sources like sewage treatment plants and non-point sources such as agricultural lands and stormwater. Pennsylvania is currently in the process of implementing its Phase II Watershed Implementation Plan (WIP), whose primary goal has been to ensure local partners, including local governments, are engaged in helping to meet TMDL requirements. Under the state's WIP, landowners and local governments have implemented innovative green infrastructure to reduce stormwater runoff, and the agriculture community has made significant investments into best management practices (BMPs) to reduce nutrient runoff, often going above and beyond requirements.

The 2014–2015 programmatic milestones in Pennsylvania's WIP include having county conservation district staff make field visits to farms to provide education and outreach materials on Pennsylvania's existing regulatory programs. The county conservation districts have also been engaging the farm community in the technical assistance necessary for implementation of BMPs. Grant funding continues to be focused on BMPs that provide cost-effective solutions for the reduction of nutrient and sediment loads to the Bay, including no till/conservation tillage, cover crops, conservation and nutrient management planning activities, and stream bank fencing using Federal Chesapeake Bay Implementation Grant (CBIG) grant monies. The state DEP also plans to conduct a series of five to ten MS4 workshops and/or webinars across the state to educate the regulated community on the implementation of the MS4–PA General Permit 13, including TMDL plans and Chesapeake Bay Pollutant Reduction Plans. If the proposed WOTUS rule goes forward as is and Federal jurisdiction is not clear, or is expanded, as a result, Pennsylvania will have to go back to the drawing board to revisit all of the work it has already done on education and BMP implementation to provide new information on any new permitting requirements.

Furthermore, if states do not make progress toward achieving the TMDL goals, EPA has the option of strengthening permits, so if Federal permits now become necessary under the WOTUS definition proposed by the agencies where they had not been required before, this would have a tremendous impact on the costs and burdens of compliance with the TMDL. It is very likely that the agricultural community would be unable to continue the positive work they have done thus far, and may even have difficulty maintaining those best management practices they have already put in place if new Federal permits are required. In addition, the need for additional funding is already one of the challenges most consistently raised when it comes to complying with the TMDL; if the commonwealth is to continue its progress to meet nutrient and sediment reductions to improve the quality of the Chesapeake Bay, available funds must be put to use on the ground and not on needless paperwork and administrative burdens. However, the proposed WOTUS definition and the apparent expansion of jurisdiction make it almost certain this is what would happen, again doing nothing to assist Pennsylvania and its local governments with the goal of protecting our water resources.

Agriculture: Production agriculture is one of the top industries and economic drivers in the commonwealth, with more than 7.7 million acres devoted to farmland. Farmers, ranchers and even water quality advocates have noted that the proposed WOTUS regulation is likely to curtail many voluntary water quality improvement projects if such projects would trigger the cost and delay of seeking Federal permits, and make it increasingly difficult to meet required water quality requirements.

We also note that state pesticide/herbicide programs and regulations will need to be reevaluated under the proposed WOTUS rule, as the EPA has a pesticide/herbicide permit for all *Waters of the U.S.* within threshold guidelines. This means anytime a pesticide/herbicide is applied on or near *Waters of the U.S.* a permit is needed, including strict program and paperwork requirements for pesticide use in communities of more than 10,000. In addition, the use of some pesticide products could be jeopardized by the proposed definition—for example, when farmers and other landowners seek to use land-based pesticides with labels that state "do not apply to water" or that require no-spray setbacks from jurisdictional waters to avoid potential spray drift. Confusion over what are Federal "waters" may expose pest-control operators to litigation and threaten effective pest management.

Finances are already one of the single biggest factors in young people's decision to get into the farming industry. Adding more uncertainty, compliance burdens and costs to their operations will not make it any more likely that this critical industry will have a viable future for the next generation.

Unexpected consequences: There are at least 13 different places in Federal regulations that reference *Waters of the U.S.*, either directly or through the definition of "navigable waters". For instance, Part 120 of the CFR, oil spill prevention regulations, requires a permit anytime an individual uses equipment or tanks around navigable waters; that permit includes requirements for spill prevention kits, training and emergency plans. The term is also referenced regarding oil pollution prevention under Part 112, which applies to homeowners that have oil tanks near navigable waters, and Part 116 related to hazardous substance and planning. CWA Section 311 covers oil spill prevention and preparedness, reporting obligations, and response planning requirements that apply to facilities engaged in production or storage of oil products based on total volume. In particular, inland non-transportation oil facilities of a certain size that have potential to discharge to navigable waters must prepare and implement Spill Prevention, Control, and Countermeasure (SPCC) plans.

While these are all important elements of protecting water quality, it does not appear the agencies have fully reviewed the far-reaching implications of the proposed definition and what the uncertainty it provides will mean in the broader picture. And with the potential for civil suits and civil penalties of $7,000 per day for violations of the Clean Water Act for individual homeowners, businesses, farmers, governments and others, it is critical that the agencies get this definition right and that it is clear and explicit.

Determination of Jurisdiction

The proposed rule's introduction also notes that there are other tools and approaches underway to increase efficiency in determining whether waters are covered, including improving the precision of desk-based jurisdictional determinations. In addition, the agencies indicate that information derived from a field observation may not be required in cases where a desktop analysis can provide sufficient information to make the requisite finding. While we understand the use of such desktop tools may be more efficient from a human resource perspective, we are concerned about the potential for over-reliance on these tools that seems to be suggested here. Several times in recent years, we have seen significant errors in modeling and other output because the data cannot always accurately reflect what is happening on the ground. For instance, as new FEMA flood maps are established throughout the state, communities have discovered technical problems in which topography indicated a flood zone would exist but a corresponding hydraulic study would have shown otherwise, had the maps been checked for real-world accuracy. In relationship to the Chesapeake Bay, the Land Use Model does not yet fully account for all BMPs, and often shows that Pennsylvania has made less progress than we see in our communities. On top of the confusion the proposed rule already creates, an over-reliance on desktop tools may create inaccurate jurisdictional determinations that will take more time and resources to resolve.

Other Questions

To what extent are tributaries considered *Waters of the U.S.?* Tributary streams are to be considered jurisdictional by rule under this proposal. Yet the proposed rule does not appear to limit the claimed jurisdiction to just waters that are direct tributaries to navigable waters, but also claims the entire network of perennial, intermittent, ephemeral and headwater streams, noting that the water must be part of a tributary system or network of tributaries that drains to a jurisdictional water. The defining characteristic of a tributary seems to be whether the water *ever* eventually flows to a jurisdictional water, not whether it is a *direct* tributary of a jurisdictional water. Is this accurate?

How will the jurisdiction of a ditch be determined? The proposed rule states that man-made conveyances are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark, and flow directly or indirectly into an interstate water, territorial sea or their impoundments, regardless of perennial, intermittent or ephemeral flow. There is an exemption for certain types of upland ditches with less than perennial flow or those that do not contribute flow to a WOTUS. But based on the uncertainty of terminology, what does "contribute flow" mean, and how will "do not contribute flow" in the exemption be determined? How would this be proven (*i.e.,* what tests would be used?). Who would have the onus to prove the ditch does not contribute to flow—the agencies or the permittee?

How is indirect flow determined? Also, when determining an indirect flow, the proposed rule says that an indirect flow is one that is "through another water"—does this mean that if more than one water stands between the ditch and the jurisdictional water, that ditch would not be considered to flow into the jurisdictional water? Or would jurisdiction be established regardless of how many "other waters" stand between the ditch and the jurisdictional water? Given that tributaries are supposed to be a "jurisdictional by rule" category (*i.e.,* a bright line category), this uncertainty should be resolved, preferably by narrowing the scope of the indirect flow rather than expanding it.

What are uplands? In the Q&A document issued by EPA, the agency defines an "upland" as used in the proposed rule as any area that is not a wetland, stream, lake or other water body, and further explains that upland areas can exist in floodplains. On page 22207 of the proposed rule's explanation, there is a statement that absolutely no uplands located in riparian areas and floodplains can ever be WOTUS subject to jurisdiction of the CWA. We have difficulty finding where either of these concepts is detailed in the proposed definition or the explanation and recommend that a definition be provided in the rule to avoid future confusion.

Why is perennial flow not defined within the proposed regulation itself? In the explanation of the proposed rule on page 22203, the agencies note that perennial flow means that water is present in a tributary year round when rainfall is normal or above normal. Yet there is no reference to this definition in the proposed regulation itself—why? The agencies indicate they are seeking comment on the appropriate flow regime for a ditch with regard to the (b)(3) exclusion; will this become part of a definition in a final rule and will there be an opportunity to comment if so?

Can jurisdiction change along the length of a ditch? The proposed definition creates a three-part test for ditches to be excluded—must be excavated *wholly* in uplands, drain *only* in uplands, and have *less than* perennial flow. Does this mean that a ditch that stretches for miles, which meets this definition in part but not in whole, would not be exempt? Or that parts of the ditch could be exempt while others are not? It seems that the entire ditch would be jurisdictional, as there is a reference on page 22203 that indicates ditches that meet these conditions for exclusion *for their entire length* are not tributaries nor are they *Waters of the U.S.*, implying that those ditches that do not meet all three parts of the exclusion would be jurisdictional. Is this a correct interpretation?

What does the term "incidental to construction" mean? The proposed rule excludes "water-filled depressions created incidental to construction activity." Many construction projects have such ditches or depressions for foundations or footers that do not appear or disappear overnight. How will "incidental" be determined to qualify for the exclusion?

To what extent does distance factor into the determination of "significant nexus"? The definition of "significant nexus" makes a reference to distance as a factor—located "sufficiently close" together or "sufficiently close" to a WOTUS so they can be evaluated as a single landscape unit. The agencies also note that there has always been an element of "reasonable proximity" in evaluating adjacency (page 22207), even though this term is not actually found in the proposed definition. The agencies further acknowledge that the distance between water bodies may be far enough that the presence of a hydrologic connection does not support an adjacency determination, even though by definition, only the hydrologic connection would matter and not the distance separating the bodies. If the agencies intend, as described, to interpret the definition of neighboring to not include wetlands a great distance from a jurisdictional water, then perhaps a distance factor should be more clearly written into the definition instead of left up to interpretation.

Why is there a separate definition for floodplains in this proposed rule? FEMA has been working with states and local jurisdictions to update its Flood Insurance Rate Maps over the past several years, and state and local governments are adopting and updating hazard mitigation plans based on those maps. The Biggert-Waters Flood Insurance Reform Act of 2012 required FEMA to contract to prepare a Report on how FEMA can improve interagency and intergovernmental coordination on flood mapping, which was released in November 2013. Given all of the work that has already been going into the new FEMA flood maps and the emphasis on stakeholder coordination, we believe it would make more sense if EPA and Army Corps worked off the same understanding of what a floodplain is.

EPA and Army Corps also seem confused among themselves on what standard they based their definition of floodplain. While the explanation of the proposed rule indicates that the definition of floodplain used is scientifically based (page 22207), question 17 of EPA's Q&A document states "The proposed rule does not define floodplain because there is no scientific consensus on how to do so." It is further difficult

to believe that adjacent (or neighboring) waters in a floodplain are to be determined on a case-by-case basis on the best professional judgment of which flood interval to use—here described as the 10 or 20 year flood zone (22209). If the standard can keep changing, how does this create a bright line category for a jurisdictional water? In addition, the commonly understood distinction between floodplains as used by FEMA is a 100 year or 50 year flood zone. Consistency among Federal agencies, and among Federal, state and local government, should be considered instead.

Connectivity Study

Finally, as noted earlier, we also believe that the underlying science of the proposed rule has not been fully vetted by the agencies in collaboration with the public to allow the rule to move forward. A public comment period should be opened on the final Connectivity Report when the report is finalized with the SAB recommendations attached, with further public comment on the proposed rule after the Connectivity Report is finalized as well.

Conclusion

The *Waters of the U.S.* definition proposed by EPA and Army Corps is confusing and so vague as to lead to interpretations of broadened jurisdiction for the Federal Government. Such expansion is wholly unnecessary here in Pennsylvania, where we have long had a comprehensive laws and regulations and a strong tradition of state and local oversight in place to protect our waterways.

The agencies have indicated their belief that the proposed rule provides greater clarity as to what waters are subject to CWA jurisdiction, thereby reducing the need for permitting authorities, including states, to make case-specific determinations, and leaving them with more resources to protect their waters. Pennsylvania's counties disagree with this analysis, and believe this proposed rule will certainly have a negative impact on our ability to protect our waters by adding a layer of Federal permitting where it has not been needed before. Creating this level of confusion and uncertainty guarantees we will spend far more time and resources arguing over who has jurisdiction and what permits and paperwork must be completed, with no actual benefit or improvement to water quality.

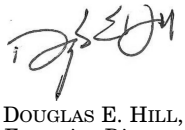
Further, with expanded Federal jurisdiction under this proposed rule, the permitting and decision making processes will be removed several levels. The benefits of local county and state knowledge working on the ground will be lost, sowing distrust between communities and regulators they never see and with whom they lack a similar relationship.

A good regulation would engage state governments, local communities and affected industries as active partners in the regulatory decision-making process. Instead, the proposed regulations seek to federalize many of the land use and community and economic development decisions that should be made by state officials and local communities. Without a clear line on what is in and what is out of WOTUS jurisdiction, it will be difficult for agriculture, industry and other businesses to plan for the future. We must achieve a better balance to assure the clarity sought in the proposed rule is in fact achieved and that additional burdens are not unintentionally and unnecessarily added to our efforts to protect water quality throughout the commonwealth.

We respectfully request that the agencies withdraw the proposed rule, and amend the rule in conjunction with input from local governments only after the final connectivity report is released, after consideration of the comments received and with a better understanding of existing state programs. CCAP would be pleased to work with the agencies to assist in assuring that the clarity sought in the proposed rule is in fact achieved and that additional burdens are not unintentionally and unnecessarily added to our efforts to protect water quality throughout the commonwealth.

We thank you for your attention to these comments. If you have any questions or would like to discuss further, please do not hesitate to contact Lisa Schaefer, CCAP Director of Government Relations, at [*lschaefer@pacounties.org*] or [717–526–1010 x 3148].

Sincerely,



DOUGLAS E. HILL,
Executive Director, CCAP,
Harrisburg, PA.

The CHAIRMAN. Thank you, Commissioner.

Mr. Fox, please proceed with your 5 minutes when you are prepared.

STATEMENT OF JOSEPH S. FOX, STATE FORESTER, ARKANSAS FORESTRY COMMISSION, LITTLE ROCK, AR; ON BEHALF OF NATIONAL ASSOCIATION OF STATE FORESTERS

Mr. FOX. Thank you, and good afternoon, Chairman Thompson, Ranking Member Lujan Grisham, and Members.

I am Joe Fox, and, by the way, I am honored to be here. I am the State Forester of Arkansas, and I represent the National Association of State Foresters. We are in 50 states, in eight territories, and the District of Columbia. State Foresters direct programs and protection for America's private forest, ⅔ of the nation's forest, 500 million acres. We are responsible for the silviculture, non-point source pollution control measures. We call them BMPs, forestry best management practices.

A recent Virginia Tech study, data collected in 2013, shows that 87 percent of our forestry BMPs are complied with, 87 percent compliance with our BMPs nationally. Arkansas' BMPs happen to be voluntary, and like other states, are very effective. In the recent EPA national assessment database, of all the sources of water impairment, it lists forestry as significantly less than any of the other sources. Healthy forests mean clean air, but they also slow water run-off, allowing sediment to drop out. Healthy forests are clean water things, if you will.

The new definition of the WOTUS rule, *Waters of the U.S.* rule, and terms within the rule, is in response to a Supreme Court ruling, we realize that, but I am concerned that what is meant for clarity is just the opposite. The National Association of State Foresters shared our concerns with our formal comments last November. In those comments, we say that terms like *all tributaries of navigable waters* mean a broader and generalized reach by the agency. Riparian areas and floodplains can be quite different if they are in New Mexico or Pennsylvania or Arkansas. It is difficult to generally describe water and land features that are regionally different. In south Arkansas, where I am from, the pine and oak flat woods of Calhoun County, 6″ means a ridge. You go over there in the ridge and you cut those trees, or you paint those trees, or you make that wildlife habitat. That is a ridge in south Arkansas, and it is not in other places. Regional differences require case-by-case solutions, not significant nexus generalities. National rules need the flexibility to do just that, to have a case-by-case analysis. Healthy, productive forests that are beside a road, that has a ditch, which now might be classified as a tributary, do not need oversight by EPA because of a generalized rule.

In conclusion, state forestry BMPs work, and what works in Arkansas is different than what works in Pennsylvania, or what works in New Mexico.

Thank you for the opportunity to speak. I will be happy to answer questions at the proper time.

[The prepared statement of Mr. Fox follows:]

PREPARED STATEMENT OF JOSEPH S. FOX, STATE FORESTER, ARKANSAS FORESTRY COMMISSION, LITTLE ROCK, AR; ON BEHALF OF NATIONAL ASSOCIATION OF STATE FORESTERS

Good morning, Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee. I am Joe Fox, Arkansas State Forester, and I thank you for the opportunity to appear before the Subcommittee today on behalf of the National Association of State Foresters. I am pleased to provide testimony to the Subcommittee on Conservation and Forestry concerning the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) proposed rule to define "*Waters of the United States*" (WOTUS) under the Clean Water Act (CWA). The National Association of State Foresters (NASF) represents the directors of state forestry agencies from all 50 states, eight U.S. territories, and the District of Columbia. State foresters direct programs that assist landowners in the management and protection of more than ⅔ of the nation's forests; over 500 million acres of private forestland. State foresters have primary responsibility for the development and implementation of state non-point source water pollution control programs for silviculture, commonly referred to as forestry best management practices, or "BMPs."

BMPs have been an integral part of state forestry agency programs since the 1970s and have provided effective, affordable, and practical measures that protect water quality when managing forests through harvesting, thinning, replanting, construction and maintenance of forest roads, and related silvicultural activities. NASF's latest report examining the effectiveness and implementation rates of state BMP programs is nearly complete. I am pleased to report to the Subcommittee that the findings indicate high rates of implementation and successful performance in protecting water quality nationwide.

I would also like to thank the Subcommittee for the strong, bipartisan support you demonstrated in the 2014 Farm Bill by including a provision to preserve the exclusion of forest roads from point source permitting under the CWA. Such action acknowledges the efficacy of BMP measures and reaffirms the significant role of state forestry agencies in protecting water quality.

NASF members work to ensure the continued flow of benefits from the nation's forests including clean air and water, forest products and jobs, wildlife habitat, and aesthetic values. These forests face many threats including wildfire and damaging insects and disease, but permanent loss of forestland from conversion to other land uses is an issue of increasing national significance. Barriers to long-term management such as inadequate markets for forest products can increase the likelihood of conversion. Similarly, confusing or complex regulatory policy can create uncertainty and administrative burdens that frustrate a landowner's inclination to invest in forest management and thereby consider other land use options

I recognize that the EPA and the Corps proposed the new definition of *waters of the United States* in response to direction from the Supreme Court of the United States and in hopes of providing more clarity for landowners and stakeholders. However, I am concerned that the proposal, as written, will do just the opposite and generate uncertainty, complicate existing procedures, and result in new legal exposure for forest landowners under the CWA. As such, NASF communicated to the EPA and Corps through comments filed in November 2014 that the association did not support the proposed rule as drafted and offered comments on specific concerns within the proposed rule.

In particular, the proposed rule's categorical definition of "all tributaries" as WOTUS, including man-made ditches and certain lands adjacent to tributaries such as riparian areas and floodplains, would seem to result in a much broader reach of Federal jurisdiction, one that distorts the concept of "significant nexus to" and ignores whether there is relative permanence of water. We propose that if a new definition of the term *tributary* is necessary, then that new definition needs to be more precise than what is currently proposed as "all tributaries."

Furthermore, NASF shared concern with the EPA and the Corps that attempting to codify and define such broad and diverse terms as *riparian area* and *floodplain* in a national rule is problematic and will not bring clarity or consistency to the implementation of the proposed WOTUS rule. If such terms are deemed necessary, then each term must be defined with specific, measurable, repeatable, and science-based metrics that can be easily understood and quickly derived when assessing all possible landscape features across the United States. This is the only way that use of these terms can lead to the consistency in application of the CWA which is the goal of this rule. In practical application, neither of these terms is appropriate for inclusion in a regulatory framework intended for national implementation, and ultimately, NASF suggests that these two terms be excluded from the proposed rule.

While the concepts of *significant nexus, ecoregion,* and *other situated waters* attempt to address scale and specific conditions, they tend to produce generalized findings and potentially unnecessary conclusions about the need for Federal jurisdiction. Due to the high variability in water features across the United States, the rule should provide some flexibility for regional or state-specific criteria rather than a one size fits all national standard. Such an approach is needed to maintain the role of local knowledge and to provide managers with flexibility while ensuring program consistency.

NASF appreciates the acknowledgement in the proposed rule that the long-standing permitting exemption in section 404 of the CWA for silviculture is not affected by the proposed rule. The silviculture exemption is an important tool that supports sustainable forest management which is critical to ensuring that private landowners have an incentive to retain forestland.

To reiterate, I am concerned that the proposed rule in its current form will likely create circumstances of more confusion rather than clarity in implementation. EPA's public acknowledgment that the proposed language may not adequately convey the principles as intended suggests that significant revisions to the proposed language will be forthcoming. Incorporating such findings will significantly change the proposed rule that NASF and many other stakeholders considered in submitting comments to the EPA and the Corps and it remains unclear if the agencies will seek additional comments from stakeholders.

Thank you, Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee for the opportunity to provide testimony this morning. I look forward to answering any questions you may have.

The CHAIRMAN. Thank you, Mr. Fox.

Commissioner Mettler, please go ahead and proceed whenever you are ready.

STATEMENT OF MARTHA CLARK METTLER, DEPUTY ASSISTANT COMMISSIONER, OFFICE OF WATER QUALITY, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, INDIANAPOLIS, IN; ON BEHALF OF ASSOCIATION OF CLEAN WATER ADMINISTRATORS

Ms. METTLER. Thank you. Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee, my name is Martha Clark Mettler, and it is my pleasure to appear before you today to provide the Association of Clean Water Administrators' perspective on the proposed rule revising *Waters of the United States*.

I am here today representing the members of ACWA as the association's President. I am currently the Deputy Assistant Commissioner of the Office of Water Quality with the Indiana Department of Environmental Management. I have been with IDEM since 1995, was named Deputy Assistant Commissioner in 2005, and have been a member of ACWA since that time. ACWA is the national nonpartisan professional organization representing state and interstate water quality control officials, responsible for the implementation of surface water protection programs throughout the nation.

The proposed rule raises implementation issues and questions that vary from state to state. Due to the varied opinions of the states, ACWA is unable to support or oppose the proposed rule. My statement today does not supersede or alter the perspective or input of any individual state. According to an analysis done by one stakeholder group, eight states support the rule, one state supports the rule with revisions, four states are neutral, ten states oppose, and 22 states believe the rule should be withdrawn.

Time spent reviewing the individual state comments will provide the Subcommittee with a clear understanding of how the proposed

rule will affect state programs. I will highlight some broad categories of concern.

Geographic variability: Due to state-to-state differences in geohydrology and water-related legal authorities, as well as uncertainty as to the effects of the rule on the implementation of various sections of the Clean Water Act, ACWA finds it difficult to comment on whether the proposed rule is suitable for all states. For example, some states question the appropriateness of Federal jurisdiction over all ephemeral streams since some rain-dependent streams flow so infrequently their effect on downstream waters is inconsequential. However, some ACWA members support Federal jurisdiction over all ephemeral streams either because they have identified a strong connection to downstream protection, or because relying on case-by-case determinations of significant nexus to downstream waters is too resource-intensive.

Exclusions: ACWA agrees that specific exclusions listed in the proposed rule provide increased clarity for regulators and the regulated community. Clear exclusion should help streamline permitting by reducing the number of individual jurisdictional determinations that will have to be made. However, some exclusions need clarification. For example, the agencies need to clarify in the final rule that ditches that drain upland, but eventually do discharge to *Waters of the United States* are not jurisdictional throughout the upland portion of the ditch. Additional clarity is needed throughout the rule. ACWA agrees with EPA and the Corps that clarity in Clean Water Act jurisdictional determinations is needed. However, to achieve that clarity, ACWA believes the agencies need to provide clear definitions in the final rule. For example, the proposed rule failed to provide clear bounds on the spatial extent of floodplains and riparian areas. Terms like *rills, gullies,* and *uplands* are not defined, but should be to add the needed clarity to the final rule. ACWA also believes that the final rule must make it clear that the ability of states to assume the 404 program is not affected.

Significant nexus analysis: The agencies should strive to limit the categories of waters that will require a case-by-case significant nexus analysis. For the, hopefully, few waters that do require significant nexus analysis, the burden should be on EPA and the Corps to make timely determinations. Agreement and consistency between Corps districts and EPA is needed to afford successful implementation of the final rule.

Finally, additional guidance is necessary. ACWA feels strongly that the agencies should develop a set of regional, ecologically-delineated guidance for key elements of the rule, like the significant nexus determinations. However, for this guidance to be useful, states must be involved in its development. Without clearer terms and guidance, states will be left to interpret the rule on their own, which will undermine national consistency, increase litigation, and perpetuate uncertainty.

Mr. Chairman, Ranking Member Lujan Grisham, and Members of the Subcommittee, I thank you for this opportunity to share ACWA's perspective on the proposed *Waters of the U.S.* rule. I am happy to answer any questions.

[The prepared statement of Ms. Mettler follows:]

PREPARED STATEMENT OF MARTHA CLARK METTLER, DEPUTY ASSISTANT COMMISSIONER, OFFICE OF WATER QUALITY, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, INDIANAPOLIS, IN; ON BEHALF OF ASSOCIATION OF CLEAN WATER ADMINISTRATORS

Chairman Thompson, Ranking Member Grisham, and Members of the Committee, my name is Martha Clark Mettler and it is my pleasure to appear before you today to provide the Association of Clean Water Administrators (ACWA) perspectives on the proposed rule revising the *Definition of "**Waters of the United States**" Under the Clean Water Act.* I am here today representing the members of ACWA as the association's President.

I am currently the Deputy Assistant Commissioner, Office of Water Quality, with the Indiana Department of Environmental Management (IDEM). IDEM is responsible for the daily implementation of the Clean Water Act (CWA) water quality programs in Indiana. I have been with IDEM since 1995, was named Deputy Assistant Commissioner in 2005 and have been a member of ACWA since that time.

ACWA is the national, nonpartisan professional organization representing the state, interstate and territorial water quality control officials responsible for the implementation of surface water protection programs throughout the nation. ACWA's members are on the front lines of Clean Water Act (CWA) monitoring, permitting, inspection, compliance and enforcement across the country and ACWA's members are dedicated to Congress' goal of restoring and maintaining the chemical, biological and physical integrity of our nation's waters.

As the primary entities responsible for carrying out the CWA, states are uniquely positioned to provide input on how the proposed rule will impact their current activities under the various CWA programs and how the reach of jurisdiction may change, dependent on their current authority under state law. The proposed rule also raises implementation issues and questions that vary from state to state; important considerations when developing a national rule of this breadth. ACWA's members reviewed and considered the proposed rule and were left with remaining comments, questions and concerns that were conveyed to the agencies in our comment letter. Due to the varied opinions of the states, ACWA is unable to support or oppose the proposed rule.

My statement today does not supersede or alter the perspective or input of any individual states and I encourage you to review individual state comments that are included in the docket so that you and the Members of the Committee fully understand the breadth of diversity among the states on this proposal. According to an analysis done by one stakeholder group, eight (8) states support the rule as proposed; one (1) state supports the rule as proposed but suggests the agencies should revise the final rule based on specific comments; four (4) states expressed a neutral opinion on the proposal; ten (10) states oppose the proposal in current form and suggest revisions; 22 believe the rule should be withdrawn and, it is not clear how the remaining six (6) states view the proposal. A review of the rulemaking docket shows that there is a wide variety of opinions among the states on the proposed rule. Time spent reviewing individual state comments will provide the Committee with a clear understanding of how the proposed rule will affect state programs and highlight the concerns that these states have with the proposal.

Lack of Consultation with States

States have long supported early, meaningful and substantial state involvement in the development and implementation of the Clean Water Act. Following publication of the proposed rule, ACWA coordinated with EPA, the Corps and other state associations to hold a series of co-regulator calls to discuss questions from the states and to gain further understanding of the proposal. These discussions were helpful and ACWA appreciates the time and effort that the agencies put into these discussions in order to explain what the rule is intended to do and not do, and to hear the viewpoints of the states. We believe, however, that EPA and the Corps must continue to engage states as their co-regulators and partners as the *Waters of the U.S.* rulemaking process comes to its culmination. Since the states are the primary entities for carrying out the CWA, we encourage the agencies to maintain regular forums and contact with ACWA and its members leading to any finalization of the proposed rule and associated implementation guidance. We look forward to continuing to work with EPA and the Corps on refining the proposal to add additional clarity and certainty to jurisdictional determinations. Writing such a fundamental rule that applies nationally is very difficult and state regulators can help the agencies as the states have an intimate knowledge of their own watersheds and delegated authorities and an understanding of the on-the-ground implementation of CWA programs.

Geographic Variability

Due to state-to-state differences in geohydrology and water-related legal authorities, as well as uncertainty as to the effects of the rule on the implementation of various sections of the CWA including the TMDL, NPDES, Non-point Source and Wetlands programs, ACWA finds it difficult to comment on whether the proposed rule is suitable for all states. For example, some states question the appropriateness of Federal jurisdiction over all ephemeral tributaries since some rain-dependent streams flow so infrequently, their effect on downstream waters is inconsequential. However, some ACWA members support Federal jurisdiction over all ephemeral tributaries, either because they have identified a strong connection between ephemeral streams and downstream protection in their state, or because relying on case-by-case determinations of whether ephemeral streams have a significant nexus to downstream waters is too resource and time intensive.

Exclusions

ACWA agrees that specific exclusions listed in the proposed rule provide increased clarity for regulators and the regulated community and we encourage the agencies to expand the list of clear exclusions in any final rule. This, in turn, may help to streamline permitting by reducing the number of individual jurisdictional determinations that will have to be made. However, some exclusions need clarification. ACWA encourages the agencies to clarify in the final rule that such ditches that drain upland, but eventually discharge to *waters of the United States* are not jurisdictional throughout the portion of the ditch that was excavated in uplands. The agencies should also include detail in the final rule or subsequent guidance on how to parse out exactly where the line is between nonjurisdictional and jurisdictional stretches of ditches, as well as how to affirm that a ditch does not contribute flow to a downstream, navigable water. Clarity is also needed on whether, when, or what parts of stormwater collection and treatment systems fall within the exclusion of "waste treatment systems" and therefore, a definition of these systems is warranted.

Additional Clarity Is Needed

ACWA agrees with EPA and the Corps that recent Supreme Court decisions created an environment of uncertainty and that clarity in CWA jurisdictional determinations is needed. However, to achieve that clarity, ACWA believes the agencies need to provide clearer definitions in the final rule. For example, the proposed rule failed to provide clear bounds on the spatial extent of floodplains and riparian areas. Similarly, additional detail is needed on the scope of a "shallow subsurface hydrologic connection." While ACWA's members agree that shallow subsurface flow can connect adjacent waters to proposed jurisdictional waters, the significance of the connection is a critical factor. The definition of "shallow subsurface hydrologic connection" should establish a clear limit beyond which a case-by-case significant nexus analysis is needed to assert jurisdiction. Additionally, the final rule should clearly state that the shallow subsurface aquifer is, itself, not jurisdictional. Terms like rills, gullies and uplands are not defined, but should be to add needed clarity to the final rule. Finally, ACWA believes that the final rule must make clear that the ability of states to assume the 404 program is not affected.

Other Waters and Significant Nexus Analysis

ACWA agrees and supports the agencies' efforts to specifically exclude certain hydrologic features from CWA jurisdiction. These exclusions will provide greater clarity and streamline the certification review process. However, for features not specifically excluded, a case-by-case significant nexus analysis will be needed to assert jurisdiction which could slow down projects. The agencies should strive to limit the categories of waters that will require a case-by-case analysis. Moreover, the proposed rule failed to clarify whether the 2008 joint guidance issued by EPA and the Corps after the *Rapanos* decision will still be relied upon to make such determinations. If not, there needs to be enough flexibility in the final rule allowing the agencies to work with the states to develop a process for determining a significant nexus. ACWA also strongly encourages the agencies to work with states on a regional basis to jointly identify policies that consistently implement the significant nexus analysis allowing for grouping of geomorphically similar waterbodies. For waters that do not easily fit into such groups, the burden should be on EPA and the Corps to timely determine jurisdiction after requests for jurisdictional determinations are made. Importantly, greater transparency from the Corps and better agreement and consistency between Corps districts and EPA is needed to afford successful implementation of the final rule.

Additional Guidance is Necessary

ACWA feels strongly that the agencies develop a set of regional, ecologically delineated guidance for both significant nexus determinations and the any of the desired clarifications described above not captured in the final rule itself. However, for this guidance to be useful, states must be involved in its development. States need greater detail on how to identify beds, banks and ordinary high water marks for the purpose of recognizing tributaries. States need greater detail on how to determine if a wetland "contributes flow, either directly or through another water" to one of the proposed jurisdictional waters set forth in the proposed rule. As was done for identification of regional hydric soils under the § 404 program, ACWA encourages the agencies to form regional committees made up of EPA, Corps and state partners, to develop any further definitions and guidance that may be needed to ensure consistent implementation of any final rule. In addition, the agencies should develop guidance on water quality standards applicable to ephemeral streams. This is important because many of these streams are dry a great majority of the time and do not generally support the CWA goals of fishable and swimmable, unlike streams and rivers that run for sustained periods (intermittent) or continuously (perennial) throughout the year. Without clear terms and guidance, states will be left to interpret this rule on their own, which will undermine national consistency, increase litigation and perpetuate uncertainty.

Mr. Chairman, Ranking Member Grisham, and Members of the Subcommittee, I thank you for this opportunity to share ACWA's perspectives on the *Water of the U.S.* proposed rule. We remain committed to the goals of the CWA and look forward to working with our partners at EPA and the Corps as they finalize the proposal. We remain ready to answer any questions or concerns the agencies may have in follow-up to our comments, and would be pleased to facilitate further dialogue with our state member agencies. I am happy to answer any questions that you may have.

The CHAIRMAN. Commissioner, thank you very much.

We will now proceed with the questioning part. Each Member will be recognized for 5 minutes of questioning, and I will exercise the opportunity to ask the first 5 minutes of questioning to this panel.

The Pennsylvania Department of Environmental Protection submitted comments on October 8, 2014 and November 14, 2014, which, if there is no objection, I would like to submit them for the record.

Seeing none, those will be submitted.

[The information referred to is located on p. 101.]

The CHAIRMAN. In these comments, the agency stated: "the rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by the Environmental Protection Agency and Army Corps of Engineer staff. This confusion will delay permitting that could undermine strong state programs. Pennsylvania asks the EPA and the Army Corps to consider an approach that recognizes regional differences and geography, climate, geology, soils, hydrology and rainfall, and that supports the strong and comprehensive state programs."

So with this in mind, my first question for the panel—this panel is would you agree that with the assertion that EPA added confusion and that this WOTUS rule could actually undermine strong and existing state efforts? Go ahead, Commissioner Smeltz.

Mr. SMELTZ. Yes, thank you, Congressman Thompson, for that question, and I would be happy to try to address that. Being that I am from Pennsylvania and I have worked with DEP in a number of permitting issues in my career, I agree—the question you asked was—if you would phrase it again. I believe it was—will the WOTUS decision or determination—rule definition——

The CHAIRMAN. Would it undermine strong, robust state programs that are currently in place?

Mr. SMELTZ. In the Commonwealth of Pennsylvania—and I have seen this history evolve over time, in the Commonwealth of Pennsylvania, the state has worked diligently, particularly with soil conservation districts which do have authority at the local level in Pennsylvania to help process environmental permits of various kinds. They have worked diligently to develop a permitting process that the counties and local jurisdictions currently fully understand. In fact, I would suggest that those regulations within the Commonwealth of Pennsylvania are actually more stringent than some—or as stringent, I had better say as stringent, as some of the Federal legislation.

So if you are already truly regulating an environmental condition, I don't know what additional Federal regulation on top of that is going to accomplish. What we are concerned about is then it will lead to more cost, more public safety risk, and more cost because the state has developed a—what they call a guaranteed turnaround time for permits. And so to answer your question, if we again add additional confusing terminology to the permitting process in a state where you already have a very thorough permitting process, then the counties that I am dealing—the counties that I represent across these—not just Pennsylvania, but across the United States, but in this case Pennsylvania, you are going to add a mixed message. You are going to delay permitting processes, you are going to add engineering fees and engineering costs. You may sometimes add risks because now a project that you are trying to complete is delayed because there are additional steps that need to be taken over and above that which is already in place. And you are going to get the desired results with the existing state permit procedures that are in place, you are going to protect water, and NACo wants counties to protect water. NACo encourages local jurisdictions and states to have regulatory and permitting procedures in place.

So to answer your question, additional confusing terminology will, in fact, do what you suggest, it will make it more complicated, more costly, and not accomplish the intended results.

The CHAIRMAN. Yes.

Secretary Witte, any thoughts from New Mexico's perspective, do you see WOTUS as in any way undermining the existing efforts that may be in place today?

Mr. WITTE. Chairman Thompson, I really couldn't have said it any better than Mr. Smeltz. The confusing issue of who regulates what has always been a problem in states like New Mexico, and when you—we have thousands of miles of streams that are intermittent, ephemeral, and you put a regulation like what is in the proposed WOTUS regulation on top of that, for the landowners, the agencies, and even the state environment department in our case in New Mexico, to know who is going to be in charge of those regulations is going to create a logistical and a costly system. And so I believe we are—it will cause a lot of confusion in our state.

The CHAIRMAN. Thank you very much.

I now recognize the Ranking Member for 5 minutes of questioning.

Ms. LUJAN GRISHAM. Thank you, Mr. Chairman.

I am going to start just where you left off. Secretary Witte, I really appreciate your following up on that question about whether

or not one of the unintended consequences would be to see a lessening of states' authority and responsibilities, and I use *state* in the broadest sense, the local governments and our private partners under the current regulatory framework, to manage clean water protections currently. What you referenced, and I am going to do it both referring back to your testimony and your comment just now, is that water jurisdiction, water management, water quality, and clean water protections are very complex, and in fact, today we know that we have several communities that, in fact, don't have safe drinking water. So the *status quo* in the current system one can argue is problematic, and that we need to do something moving forward because there are jurisdictional questions and issues in the current context that are not working. Would you agree?

Mr. WITTE. Yes, Ranking Member Lujan Grisham, I would absolutely agree that it is a challenge in today's environment, even without the WOTUS rule.

Ms. LUJAN GRISHAM. I really appreciate that because—and that is not to minimize that you identified significant issues with the current proposed rule, but that getting to a place where all of the stakeholders are clarifying responsibilities and opportunities so that ultimately we protect our water is really important.

One of the other issues that you identified is that arroyos and we have another thing called *acequias* in the Southwest, primarily New Mexico. One is naturally occurring, arroyos, which are often sort of monsoon and are natural geography-related. It is dry, then it is really wet, it is dry, really wet, so we have these incredible erosions that water will flow through. And then we make some of those ourselves, those are *acequias* so that we can create a water management and irrigation system opportunity. These are not defined by the proposed rule, and it is a small example, but an important example, to a rural state like New Mexico, about the inability for EPA in the current context to really understand some of the issues that we have to deal with, and the complexities of the jurisdiction.

I was struck by several of the panelists talking about the withdrawal of the rule, and I am wondering, as we look at methods, going forward, if we should also ask EPA to do a supplemental rule because they have significant comments that, frankly, they ought to address and they ought to reengage their stakeholders using, in fact, the arroyo as an example, that they are not quite prepared to move forward, and a supplemental rule would give my stakeholders and yours a much quicker opportunity to weigh-in from that baseline.

What do you think about that?

Mr. WITTE. Chairman Thompson, Ranking Member Lujan Grisham, I couldn't agree more. The opportunities that EPA has really to bring people—you had over one million people comment on this proposed rule, and while we call for the withdrawal of the rule, we know that WOTUS, the *Waters of the U.S.*, has to be addressed at some form and fashion.

As a regulator in my state, I know that regulations were created for a purpose, and over time they evolve, either through other decisions or court cases or whatever. And every now and then as an agency, we have to take a step back and look at the real true pur-

pose. Every comment that I reviewed in preparing for this hearing said virtually the same thing: withdraw, re-propose, collaborate with the local groups from the ground up. EPA has an unprecedented opportunity to bring people together and really consider—there are some dynamite, fantastic comments that EPA could use to make a rule that works. It doesn't fit—one size doesn't fit all, as was pointed out on this panel. We, in New Mexico, are unique, just as the folks in Pennsylvania and Arkansas, and all across this nation, and you really have to take that local input. It is important, and they have an opportunity to bring it back together and get something that works.

They propose a rule that doesn't address a lot of these issues, it is just going to be as confusing as it is today.

Ms. LUJAN GRISHAM. Mr. Secretary, I appreciate your time. I am really out of time for the rest of the panel. Thank you for being here today.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. The gentlelady yields back, and I thank her.

And we now recognize the gentleman from Tennessee, Mr. DesJarlais, for 5 minutes.

Mr. DESJARLAIS. Thank you, Mr. Chairman. And thanks to our panel.

We have an awful lot of issues that we face here in Congress, whether it is the healthcare law, whether it is the threat of ISIS, or the deficit, any number of issues, but I can tell you that this *Waters of the U.S.* rule has really grabbed the attention of a lot of people, and I would—I know it is not Tennessee-centric because I have contacts from around the country, whether it is California, South Dakota, Colorado, calling me saying you have to stop this rule. So I am very grateful that we are having this hearing today.

I want to kind of look at it from an oversight perspective a little bit today in terms of how so many agencies are taking steps to circumvent the rule review process, and specifically I would like to look at it economically in terms of how the OIRA and EPA have tried to circumvent this rule.

On March the 3rd, Mr. Howard Shelanski, the Administrator of the Office of Information and Regulatory Affairs, OIRA, easy for me to say, right, testified before the House Oversight and Government Reform Subcommittee on Administrative Rules, and this, of course, is the office responsible for reviewing the legality and economic impact of a new Federal rule before they are published, and ultimately accepting or rejecting the proposed rule. It was troubling to me that when we asked Mr. Shelanski whether or not he could present to our committee the documents that they used to make a ruling, that this was non-major or economically non-significant. We know the cut-off for that is $100 million per year, so what I am going to ask of you all later, and possibly the second panel, is that we talk about that $100 million per year cost. Somehow after reviewing the *Waters of the U.S.* rule, OIRA determined that it was not a significant rule and, therefore, not subject to Congressional review, despite estimates of annual costs ranging from $160 to $278 million per year, and some of these estimates coming from Army Corps of Engineers and EPA. And what was also concerning was the lack of documentation that Mr. Shelanski was unable to

provide because it wasn't just the Tennessee Farm Bureau, which is the largest in the nation, who was here asking questions, or farmers from all around our district, the NFIB, or National Federation of Independent Businesses sent a FOIA request, a Freedom of Information Acts request, to the EPA, and also Small Business Office of Advocacy sent letters asking for documentation on how they came about this rule, and the EPA sent a letter back saying they have no documentation.

So I guess what I would like to accomplish today is that, next time we have Mr. Shelanski or the EPA in front of one of our committees, we can give them documentation that this rule is indeed going to cost more than $100 million.

So I don't know if anyone on the panel came prepared with numbers but, Mr. Smeltz, do you have any idea from what you have been hearing from your folks back home what the economic impact might be?

Mr. SMELTZ. Well, I don't know what broad spectrum of jurisdiction this $100 million figure you are speaking of is. Are you talking about across the state?

Mr. DESJARLAIS. Across the nation.

Mr. SMELTZ. Across the nation. Okay, well, it would be hard for me to address that from that perspective.

I can only tell you, while I don't have any raw numbers, I can get raw numbers, and we have done this now since the times—I can tell you that the imposition of any delays. For example, there was a project in our area in Pennsylvania where an amendment had to be made to a $27 million road project. Now, this road project—there was a change in the environmental design, there was a change in the ditch pattern that they were going to use to build—it was a bridge in an interchange, it was worth $27 million.

Mr. DESJARLAIS. Okay. Mr. Smeltz, if you could, just because I only have about 24 seconds——

Mr. SMELTZ. Okay.

Mr. DESJARLAIS.—does anyone else on the panel——

Mr. SMELTZ. I am sorry.

Mr. DESJARLAIS.—have an estimate or an opinion as to whether or not they are hearing that this would have an economic impact of more than $100 million per year?

Okay, if anyone can get that, perhaps the second panel, that would be useful information to make sure we get to the EPA and we get to OIRA when they are trying to make a determination on this rule.

And thank you for your time. Sorry to interrupt you, sir.

The CHAIRMAN. I thank the gentleman.

Just so everyone is aware, our votes will be pending here perhaps—well, any time——

VOICE. Started.

The CHAIRMAN. Have they started already?

VOICE. I think so.

The CHAIRMAN. Okay. So we will continue here with questioning to see how far we can get until—we do want to make sure Members get to the floor in time to cast their vote.

So I now recognize, from Washington State, Ms. DelBene for 5 minutes.

Ms. DELBENE. Thank you, Mr. Chairman. And I just want to thank all of you for being here with us today. This is an important issue. I have heard about it from farmers throughout my district, and also on the other side, we had over 17,000 Washingtonians who sent in comments in support of the rule. So it is definitely a very relevant issue in our region.

Ms. Mettler, I wanted to make sure that everyone is kind of operating with the same information, I wondered if you could walk us through the differences in section 402 and 404 permits, the kind of the activities they cover, and the special case for pesticides.

Ms. METTLER. Sure. For section 402, that is generally wastewater discharges either from municipal or industrial dischargers, and most states have a broad definition of *waters of the state* that they use to implement that program if it has been delegated to their state, which most states have, but not all. And so those kind of permits regulate the discharges from ends of pipes from those facilities, and would just regulate a number of regulated contaminants that we would want to keep under the water quality standards.

Section 401 is a water quality certification that any fill—discharge or fill material would be meeting our water quality standards. And that is a companion document to the Army Corps' section 404 permit. So you do have to work in conjunction with the Corps to make sure that you get all your permits, and that was one of the things that was mentioned earlier.

The pesticide general permit was, as mentioned, kind of added as a concern due to a court ruling to maintain permits for applications of pesticides on or near water. That is a general permit so most states developed a broad set of requirements that if you satisfy those in your applications of permits, you send in a notice of intent and you are covered by that permit. With that, you are under FIFRA regulations as well to apply according to the label.

Ms. DELBENE. Thank you. I appreciate that. You also said in your testimony that—and everyone mentioned this—that many parts of the rule need additional clarification, and that is definitely something I have heard from all of our farmers as well. I ran a state agency, I understand rules are not always applied how they were intended, and that they aren't always perfect. Given that, are there adequate clarifications that if they were made to a final rule where you could see the rule as a benefit for the community and from your perspective as a regulator?

Ms. METTLER. Well, if you go back in history to the agencies first attempted guidance, I won't be able to give you the date but a few years back, and that was not sufficient for most states that were trying to maintain regulatory certainty because they are trying to follow the Federal rule and the implementation of their state rules. So there are different ways, as the Ranking Member mentioned, of getting to that regulatory certainty in this rule, and I think that states would be open to different ways as long as you ended up in that place where you did have a clear understanding of the meaning, and again, to really get there you do need to collaborate with the regulated community as well as your state co-regulators, and that is important

Ms. DELBENE. You actually brought up a concern that we have heard from folks about the proposed rule not having engagement with state and local officials. Were any of you involved or contacted, asked for feedback?

Ms. METTLER. Prior to the proposal, no.

Mr. WITTE. No.

Mr. SMELTZ. No.

Mr. FOX. No.

Ms. DELBENE. Thank you. Each region of the country also faces unique issues with water. I think you brought this up in terms of Arkansas. In the Northwest, we have a lot of water but not always necessarily in the right place at the right time. A concern I have heard repeatedly is that working farmland is at risk. In addition, many of our farmers have brought up the interface between water quality and quantity, specifically related—and you talked about this earlier, specifically related to new upland areas within the Clean Water Act jurisdiction where water is withdrawn for irrigation or other uses. There is now a potential link to the Clean Water Act, and thus some farmers are worried about a prohibition on withdrawals or against future allocation of waters.

This is a general question for everyone. I guess I don't have enough time left to get all your answers, but I wondered if you could comment on this concern from your perspectives or if you are able to send us feedback on that another time, because I am running out of time.

The CHAIRMAN. The gentlelady's time has expired, but that information certainly would be appreciated if you could put that in writing and follow up to the Committee.

Ms. DELBENE. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you.

I now recognize the gentleman from Michigan, Mr. Benishek, for 5 minutes.

Mr. BENISHEK. Thank you, Mr. Chairman. I would like to also thank the panel for being here. I truly appreciate you coming to Washington to talk to us.

I represent northern Michigan, and Michigan has over 20 million acres of forestland, which represents over ½ the landmass of the state, and of that, over 12 million acres is privately owned. And our foresters and timber managers are working hard to keep the forests properly managed. And I am concerned about the cost and burden of additional Federal forest regulations that would prove detrimental to a struggling industry in my state.

Mr. Fox, what are you hearing from foresters in your area about the proposed rule and how it will impact the forest industry in your state?

Mr. FOX. Well, in general, they are fairly worried about the possibilities of the stretch of our longstanding forest road ditches that are connected to something, are they going to be jurisdictional with EPA and the Corps of Engineers. There is talk of closing roads, there is talk of closing certain private lands. There are worries over, if I am in the business of producing timber, will I be able to get the timber to the mill. So those worries actually depreciate the value of the trees and the land they are on.

Mr. BENISHEK. What effect do you think the proposed rule will have on forest health, Mr. Fox?

Mr. FOX. Well, the healthy forests are those forests that are thinned, and in Arkansas, thinned underneath as well as thinned from above. And if we can't get skidders and feller bunchers and forwarders on the ground, or over the roads, the trucks to the mills, that is a real big problem. The effect is the uncertainty of whether we can produce from these acres. And that uncertainty, again, leads to sometimes conversion to other uses rather than forests, which would be the worst thing that can happen for our forests, or sometimes it leads to devaluation of the land and timber.

Mr. BENISHEK. Let me ask another question. If the rule goes through as proposed, does the infrastructure currently exist to help both private landowners and other foresters remain in compliance? What issues do you see them facing?

Mr. FOX. Arkansas is a non-regulatory state, so the infrastructure does not exist to do that. We would have to build our State Forestry Commission personnel to help landowners or contract with consultants. The infrastructure is not in place in my state to deal with it.

Mr. BENISHEK. Mr. Smeltz, do you have any opinion on that? Do you have to deal with these issues in your county?

Mr. SMELTZ. We are not specific with forest perhaps, but we are a largely forested county where I am from in Clinton County, but county governments are responsible for the maintenance of a vast majority of the nation's raw highway system when you leave the non-interstate systems, so that the key to maintaining an infrastructure system is, of course, drainage, proper drainage. And if the abilities to maintain—because of the ambiguity in some of the terminology and additional permits being required, and knowing what to do—where the counties to maintain highway systems and road systems, where the rubber meets the road, if there is confusion in that arena it is going to lead to failures in your infrastructure if you don't—if you are not able to maintain ditches and be able to clean ditches. So we certainly don't want a rule interpretation that hinders that process at the county level. And so, yes, that——

Mr. BENISHEK. And——

Mr. SMELTZ.—is of grave concern.

Mr. BENISHEK. Secretary Witte, let me ask you a question similar to that. Do you think that this regulation adds more clarity to a plan of managing the *Waters of the U.S.?*

Mr. WITTE. Mr. Chairman, Congressman Benishek, absolutely not. As it is currently stated and proposed, it does not add clarity. It actually adds confusion. My concern would be is the attitude of the agency going to be regulatory enforcement or compliance assistance, and typically it has been, in the past, regulatory enforcement. And that is the thing you have to watch out for if you have unclear rules and regulations.

Mr. BENISHEK. Thank you very much.

The CHAIRMAN. The gentleman's time has expired.

The chair would just inform everybody they have called votes, but we are going to be able to get through the Members that are present for questions, should you choose to stay. And then we will

resume 10 minutes after the last call to vote is announced. So I encourage you to vote right away and please come on back.

I now recognize the gentlelady from Arizona, Mrs. Kirkpatrick, for 5 minutes.

Mrs. KIRKPATRICK. Thank you, Mr. Chairman, and thank you, Ranking Member, for having this important hearing.

This is a big issue for my huge Arizona Congressional district. In fact, with all due respect to you, Mr. Chairman, and Mr. Smeltz, my Congressional district is bigger than the entire Commonwealth of Pennsylvania, and it is covered in forest. We have recently had some horrific and fatal forest fires. In fact, my neighbors in New Mexico may have experienced some of the smoke from those fires.

Secretary Witte, my question is for you. And actually, I have three, so in the interest of time, I am going to ask the three questions at one time, and then you can answer them. In your testimony, you said that the proposed rule would make fire prevention, fire management, and rehabilitation more difficult. My first question is what specifically in the proposed rule would do that, would make fire prevention more difficult. My second question is will the proposed rule require any new or different permitting. And then what is your suggestion to changes in the rule that would allow us to continue our forest practices uninterrupted?

Mr. WITTE. Mr. Chairman, Congresswoman Kirkpatrick, it is my belief that if you look at the rule and the potential, because of the unclear definitions of *arroyos* and *ditches* and things like that, gullies, that if we, in fact, have regulatory creep into areas that weren't historically regulated, you could increase permitting. And if you are going to go in and, we in New Mexico, and probably in Arizona, they are a lot the same, we wish we had a forest industry. We have mismanaged, overgrown forests that are causing these catastrophic wildfires, and we have to get in there. And right now, the Forest Service is hampered because of issues, but they have to do their environmental assessments, their environmental impact statements and things like that. If you add this on top of that, there is one more permit and one more step they have to go through before we can actually manage the forest properly to avoid these catastrophic wildfires.

I think that is the critical point of confusion that we have to address and clarify in forest management.

Mrs. KIRKPATRICK. In other words, we need to streamline the process for clearing the acreage that can be logged, rather than increasing that regulation process.

Mr. WITTE. Mr. Chairman, Congresswoman Kirkpatrick, exactly.

Mrs. KIRKPATRICK. Okay, thank you.

I am going to yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady.

And I now recognize the gentleman from Illinois, Mr. Bost, for 5 minutes.

Mr. BOST. Thank you, Mr. Chairman.

I am going to ask a fairly simple question real quick because we are kind of pressed for time to get across the street—and anybody on the panel, if you can. Whether the agency—if they expand the definition, or we just stop them from expanding the definition, do you think your local governments are in the position to make sen-

sible law to take the control that is necessary? I came from state government and I know how I feel about that, but I would like to hear your comments on that.

Mr. FOX. My comment from Arkansas would be that we have little regulation in this area for forest. We are a very collaborative state. We are working together with groups like the Nature Conservancy, the Arkansas Timber Producers Association, the Arkansas Forestry Association, Arkansas Game and Fish Commission, and we train loggers and foresters and forest landowners how to treat their roads, their stream crossings, their harvesting units, and it is all done on a voluntary basis, and it is working rather well.

Our compliance rate in Arkansas is 87 percent overall, and 90 percent on those, in my mind, that really mean something, and that is like stream crossings. It is a big deal to us to regulate ourselves, but on a voluntary basis, and that is what I like.

Mr. SMELTZ. Thank you, Congressman, for that question. I would say that the—a collaborative effort is what is desired by NACo, and that collaborative effort, it varies from—we are hearing it varies from state to state as far as the—as you are saying in Illinois, the regulatory processes within each state, but for those who—if I may say, the boots on the ground folks at the county level, those who are responsible for maintaining infrastructure who have to deal with the consequences of this regulatory, they are the ones you really need to consult with. But I can speak to Pennsylvania, that the collaborative effort between the soil conservation districts, the county governments, the state government has produced the results that I believe this rule is trying to accomplish. There may be areas where it does need to be tightened perhaps in other parts of the country, but please, I would ask that that collaborative approach be used, and please consult with the people who do the work, and they will tell you and they will help you try to get what you are trying to accomplish. And, therefore, that is why we ask for the rule to be withdrawn and start all over with a more complete process where all the facts are considered. Thank you.

Mr. WITTE. Chairman Thompson, Congressman Bost, the states have the capacity to deal with at a certain level, but all of the states are—as I was visiting with our environmental department secretary earlier today about this, his point was that even today, states are struggling with their budgets and if you add one more thing onto the state requirement, they are not sure they can handle it without further resources from EPA or whoever is requiring it.

Because of the budget stress though, it causes collaboration. And as Mr. Smeltz added, the environmental department works with our agency, the State Department of Agriculture, soil and water conservation districts, and others, to collaborate and find the best opportunities to work together to address the water quality needs in the State of New Mexico, and that is including EPA at this point in time.

Ms. METTLER. I guess I would just simply say that, as mentioned before, the beauty of the Clean Water Act is it delegates certain authorities to the state, and the states are pretty dedicated to protecting their waters and prioritizing based on what they think is important within their own regulatory frameworks. And so to have

that flexibility to prioritize based on their own landscape is important.

Mr. BOST. Thank you all for your answers.

From state government is where I came originally, and I kind of agree with all of you that this is kind of an overreach, so hopefully we can move forward in the right direction.

Mr. Chairman, I yield back.

The CHAIRMAN. The gentleman yields back.

I now recognize the gentleman from Georgia, Mr. Allen, for 5 minutes.

Mr. ALLEN. Thank you, Mr. Chairman.

And obviously hearing lots about this issue, and it sounds like that EPA has made some determination here that we have a serious problem. What are they using as evidence that would create all of this discussion? Are we not taking care of our streams and tributaries like we should be? What exactly are they up to here?

Mr. Fox, I would like to know your viewpoint on that.

Mr. FOX. Well, if I am able to give my opinion, they are responding to two things, and first is a Supreme Court decision, the *Rapanos* decision; and second, to budget cuts. EPA has suffered several budget cuts over the last several years. They have less capacity to do site-by-site jurisdictional investigations, and they don't have enough people to do what—the way they have done business before. And, frankly, I see this as a generalized effort to streamline their work so that they can get their work done. I think it takes a year to get a ruling on a jurisdiction.

Mr. ALLEN. Yes. Mr. Smeltz, would you have an opinion on that?

Mr. SMELTZ. Yes. I am not sure what the EPA is trying to do. I would tell you this, sir, that counties across the United States, it is to our advantage for purposes of agriculture, tourism, recreation, we want clean water. You don't need to teach us at the county level that we want to—we want to do that because we—I like Mr. Fox's comment that collaborative—would we do it to the degree without any—I don't know, but we know the importance.

The other thing is, I would suggest that they are creating—not to dispute Mr. Fox's comments, it was interesting, they may be creating themselves more work by——

Mr. ALLEN. Yes.

Mr. SMELTZ. So I——

Mr. ALLEN. That is what I am thinking——

Mr. SMELTZ. Yes. If they already——

Mr. ALLEN.—is——

Mr. SMELTZ.—are short-staffed, they are going to create more work——

Mr. ALLEN. Yes.

Mr. SMELTZ.—for the counties.

Mr. ALLEN. Counties, states——

Mr. SMELTZ. Yes.

Mr. ALLEN.—everybody is going to be imposed on.

Mr. SMELTZ. Everybody, and we are going to have to hire more engineers, we are going to have to perhaps hire more attorneys——

Mr. ALLEN. Yes.

Mr. SMELTZ.—to resolve these issues, and we certainly don't want to do that, no offense to any attorneys in the room, but we

don't want to spend our money that way. We want to spend our money in building infrastructure, not in sorting out confusing rules. So I scratch my head in response to your question.

Mr. ALLEN. Yes. Exactly, and——

Mr. SMELTZ. Thank you, sir.

Mr. ALLEN. Mr. Secretary, any comments in that regard?

Mr. WITTE. Chairman Thompson, Congressman Allen, I have no idea what EPA was thinking. When you are under the kind of budget situation that we meet with our region 6 and they talk about their tightness of resources all the time, and when you come out with a rule like this that is going to require more, sometimes it is better off if they would take a step back and try to figure out something that makes more sense and really hit the ground with something that will work.

Mr. ALLEN. And, Ms. Mettler, would you have a comment as well?

Ms. METTLER. Well, I just was going to mention that the current rule does lead to some regulatory uncertainty.

Mr. ALLEN. Yes.

Ms. METTLER. And if you believe EPA in their description of what they were trying to accomplish was additional clarity——

Mr. ALLEN. It covers everything, right?

Ms. METTLER. Yes.

Mr. ALLEN. I mean a hole in the ground, pretty much.

Ms. METTLER. So some states have struggled with——

Mr. ALLEN. Yes.

Ms. METTLER.—current wording to try and get those jurisdictional determinations. So if you could get clarity, that would be good.

Mr. ALLEN. Right. What bothers me is that they just don't seem to want to know what you are thinking. How do we solve whatever problem we have here, and so they create all this uncertainty, and everyone is up in arms about it because you are talking about a lot of money here that could be spent, that folks—things are tight everywhere, and folks are—it is tough. It is tough out there. I mean the timber business is tough right now, and it is wet everywhere, at least in my district, so it is hard to get the timber out of there.

But thank you so much for being here today, and I appreciate your expertise, and we will do everything we can for you.

The CHAIRMAN. The gentleman yields back. I appreciate it.

Thank you to the first panel for your expertise and your testimony. It is greatly appreciated.

As announced before, there is a series of votes that have been called and in process, and I anticipate this series of votes to last approximately until 3:55 p.m., and Members will return to the hearing as quickly as possible following the last vote.

This hearing will stand in recess subject to the call of the chair.

[Recess.]

The CHAIRMAN. Thank you everybody for your patience as we were interrupted on the floor. I assure you that was the last vote series on the floor, so we won't have any other interruptions like that at this point.

I would like to welcome our second panel of witnesses to the table. Ms. Ellen Steen, General Counsel and Secretary, American Farm Bureau Federation, from Washington, D.C.; Mr. Jonathan Gledhill——

Mr. GLEDHILL. Gledhill.

The CHAIRMAN. Gledhill. See, I should go with my gut instincts, and I didn't do that, I waivered there. President of the Policy Navigation Group, on behalf of the Waters Advocacy Coalition, Annandale, Virginia; Mr. Russ Biggica, Director of Government, Legislative and Economic Development, Pennsylvania Rural Electric Association out of Harrisburg, Pennsylvania; Mr. Sledge Taylor, cotton, corn, soybean, wheat, sorghum, and peanut producer, from Como, Mississippi; and Mr. Steve Foglesong, livestock producer, from Astoria, Illinois. Thank you all for your written testimony you submitted. I know that all Members received a copy of that. I thought it was just very thorough, great information. We are looking forward to your oral testimony. Your oral testimony is 5 minutes. The light system is in front of you. Basically, when it gets to red we just ask that you begin to wrap up whatever thoughts you are on at that point.

And, Ms. Steen, would you please go ahead when you are ready?

STATEMENT OF ELLEN STEEN, J.D., GENERAL COUNSEL AND SECRETARY, AMERICAN FARM BUREAU FEDERATION, WASHINGTON, D.C.

Ms. STEEN. Thank you, Chairman Thompson, and Ranking Member Lujan Grisham. My name is Ellen Steen and I am the General Counsel and Secretary of the American Farm Bureau Federation.

I have spent the better part of my legal career, more than 2 decades, focused on the Clean Water Act and its implementing rules, particularly as they apply to agriculture and forestry activities. I have defended farmers and forestland owners against the enforcement actions by EPA and by environmental interest groups who advocate broad interpretations of regulatory obligations, and narrow interpretations of agricultural and forestry exemptions.

I have closely studied the proposed rule, reading it against the backdrop of my own experience, and I would stake my professional reputation on the fact that this rule, unless it is dramatically altered from what was proposed, will result in Clean Water Act permit requirements and potential liability for an enormous number of commonplace and essential farming, ranching and forestry practices nationwide. I say potential liability only because we cannot know today which farmers will face agency enforcement or citizen lawsuits. We also cannot know exactly when those inspections and lawsuits will happen, but what is certain is that a tremendous number of common, responsible farming and ranching and forestry practices that occur today without any need for a Federal permit will be highly vulnerable to agency enforcement and citizen lawsuits under this rule.

Congress never intended to impose Clean Water Act regulation on ordinary farming and ranching activities. Instead, Congress designed incentive-based, state-led programs to promote responsible farming and ranching practices. We support those programs. We support environmental stewardship among farmers and ranchers,

and we certainly support clean water, but what we don't support is regulatory changes that would impose costly, complex and highly punitive Federal regulatory programs on hundreds of thousands of farmers and ranchers nationwide.

Over the past year, EPA and the Corps have repeatedly told farmers and ranchers that they have nothing to fear from the proposed rule because normal farming is exempt from regulation. These statements are false. The existing agricultural exemptions, as interpreted by the agencies, will not protect farmers and ranchers from burdensome Federal permitting requirements and potentially devastating liability under this proposed rule. I have summarized the reasons why in my written testimony, and I would be pleased to answer questions here today or at any time about the scope of the agricultural exemptions.

The EPA officials here in Washington have said that our concerns about the rule are not justified, even silly, but out in the countryside, our experience is that EPA and the Corps interpret their rules broadly, not narrowly. Just as important, citizen plaintiffs had the power to enforce the Clean Water Act, and their lawyers will take the broadest possible interpretation of the rule. At least based on the language in the proposed rule, which is all we have seen, I can say that farmers who dare to farm near or across ditches, small wetlands or ephemeral drainages will be at great risk if they ever catch the eye of agency inspectors or environmental interest groups.

Promulgation of this rule will leave farmers and ranchers with no acceptable alternative. They can either continue farming, but under a cloud of uncertainty and risk, they can take on the complexity, cost and equal uncertainty of Clean Water Act permitting, or they can try to avoid doing anything near ditches, small wetlands or stormwater drainage pads on their land. It is a no-win situation for farmers and ranchers. It is not what Congress intended, and it is not necessary for clean water.

Thank you for the opportunity to speak, and I look forward to any questions you may have.

[The prepared statement of Ms. Steen follows:]

PREPARED STATEMENT OF ELLEN STEEN, J.D., GENERAL COUNSEL AND SECRETARY, AMERICAN FARM BUREAU FEDERATION, WASHINGTON, D.C.

I would like to thank Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee for the opportunity to testify on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) (together, "the Agencies") proposed rule to define "*waters of the United States*" under the Clean Water Act (CWA) and on the rule's impact on farmers, ranchers and rural America.[1]

My name is Ellen Steen, and I am the General Counsel and Secretary of the American Farm Bureau Federation (AFBF). In my current position and in 2 decades of private law practice prior to joining AFBF, I have become all-too familiar with how Clean Water Act regulations are interpreted by the Agencies and by the courts. I have litigated over the validity and interpretation of Clean Water Act regulations concerning the use of pesticides, permit requirements for livestock and poultry farms, the scope of Clean Water Act exemptions for farming and forestry, and the scope of "*waters of the United States*." I have defended farmers and forest landowners against enforcement actions by EPA and by environmental interest groups

[1] The proposed rule is published at 79 *Fed. Reg.* 22188 (April 21, 2014).

who advocate broad interpretations of Clean Water Act regulatory obligations and narrow interpretations of agricultural and forestry exemptions.

I have closely studied the proposed rule—reading it against the backdrop of my own experience with the interpretation and enforcement of Clean Water Act regulations. I would stake my professional reputation on the fact that this rule—unless it is dramatically altered from what was proposed—will result in potential Clean Water Act liability and Federal permit requirements for a vast number of commonplace and essential farming, ranching and forestry practices nationwide. I say "potential" liability only because it is impossible to know how many farmers, ranchers and forest landowners will be visited by agency enforcement staff or will be sued by citizen plaintiffs' lawyers—and it is impossible to know when those inspections and lawsuits will happen. But what is certain is that a vast number of common, responsible farming, ranching and forestry practices that occur today without the need for a Federal permit would be highly vulnerable to Clean Water Act enforcement under this rule.

Several statutory exemptions demonstrate Congress's clear determination *not* to impose Clean Water Act regulation on ordinary farming and ranching activities. Over the past year, EPA and the Corps have repeatedly said that farmers and ranchers have nothing to fear from the proposed rule because those traditional agricultural exemptions remain intact. These statements are misleading. The existing agricultural exemptions, as interpreted by the Agencies, will not protect farmers and ranchers from burdensome Federal permit requirements and potentially devastating liability under this proposed rule.

Agency and judicial interpretations over the past several decades have significantly limited the agricultural exemptions that have traditionally insulated farming and ranching from Clean Water Act permit requirements. Much of the remaining benefit of those exemptions would be eliminated by an expansive interpretation of "*waters of the United States*" to cover ditches and drainage paths that run across and nearby farm and pasture lands. The result would be wide-scale litigation risk and potential Clean Water Act liability for innumerable routine farming and ranching activities that occur today without the need for cumbersome and costly Clean Water Act permits. To understand why, one must look to the specifics of each exemption.

1. Exemption from Section 402 Permitting for Agricultural Stormwater and Return Flows from Irrigated Agriculture

One key agricultural exemption applies to "agricultural stormwater discharges" and "return flows from irrigated agriculture." Congress recognized that stormwater and irrigation waters can carry nutrients, pesticide and other materials from agricultural lands, but did not want to impose section 402 permit requirements for farmland runoff or irrigation waters. Thus, Congress specifically excluded precipitation runoff and irrigation water from regulation as a "point source" discharge.[2] The exemption applies even if the stormwater or irrigation water contains "pollutants" and is channeled through a ditch or other conveyance that might otherwise qualify as a "point source" subject to Clean Water Act section 402 National Pollutant Discharge Elimination System (NPDES) permit requirements.

The proposed rule would severely undermine this exemption by regulating as "*waters of the U.S.*" the very ditches and drains that carry stormwater and irrigation water from farms. As drafted, the statutory exemption applies to pollutants discharged into navigable waters *carried by* stormwater or irrigation water, which would typically flow through ditches or ephemeral drainages. However, the exemption was not crafted to cover the direct addition of pollutants into "*waters of the U.S.*" by other means—such as materials that fall into or are sprayed into jurisdictional waters.

In enacting the Clean Water Act in 1972, Congress likely would not have imagined that the beneficial and intentional application of useful products to farm fields could be viewed as a discharge of "pollutants"—even if those fields might contain wetlands or might adjoin streams. Over the past 2 decades, however, courts have found that the beneficial use of pesticide in accordance with label requirements *can* be a discharge of "pollutant" that requires a Clean Water Act section 402 permit, if pesticide falls into *waters of the U.S.*[3] The reasoning of those court decisions also would place other useful activities at risk of being deemed a discharge of "pollutant"—such as the application of chemical or organic fertilizer.

---

[2] *See* 33 U.S.C. § 1362(14).

[3] *See League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren,* 309 F.3d 1181 (9th Cir. 2002); *National Cotton Council* v. *EPA,* 553 F.3d 927 (6th Cir. 2009).

Because ditches and ephemeral drainages are ubiquitous on farm and ranch lands—running alongside and even within farm fields and pastures—the proposed rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields without triggering Clean Water Act "pollutant" discharge liability and permit requirements. A Clean Water Act pollutant discharge to *waters of the U.S.* arguably would occur each time even a *molecule* of fertilizer or pesticide falls into a jurisdictional ditch, ephemeral drainage or low spot—even if the feature is *dry* at the time of the purported "discharge." Courts (and EPA) have long held that there is no *de minimis* defense to Clean Water Act discharge liability. Thus, to avoid liability, farmers will have no choice but to seek a discharge permit for farming, or else "farm around" these features—allowing wide buffers to avoid activities that might result in a discharge. Such requirements are contrary to Congressional intent and would present substantial additional hurdles for farmers who wish to conduct practices essential to growing and protecting their crops.

2. Section 404(f) Exemption for "Normal" Farming and Ranching Activities

Another important exemption excludes "normal" farming, ranching and forestry activities from section 404 "dredge and fill" permit requirements.[4] This exemption specifically applies to discharges of "dredge and fill" material, which would include moving dirt—*e.g.,* plowing, grading, digging, *etc.*—in wetlands that are deemed to be "*waters of the United States*." Congress enacted the exemption in 1977, in response to Corps regulations defining "*waters of the United States*" to include certain wetlands. Under the exemption, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are generally exempt from section 404 permitting requirements.[5]

While Congress's plain words might seem to broadly insulate *all* "normal" farming, ranching and forestry from section 404 permit requirements, EPA and the Corps quickly narrowed the exemption—and have continued to narrow it over the years. For example, the Agencies immediately promulgated regulations interpreting the exemption to apply only to "established"—*i.e.,* "ongoing"—operations.[6] Because the exemption was enacted in 1977, this has been construed to mean that only farming ongoing at the same location since 1977 was exempted from permit requirements.[7] Newer (post-1977) operations that involve farming or ranching in jurisdictional wetlands would, according to the Agencies, require a section 404 permit until the operation has become "established."[8] Even where farming or ranching has been temporarily stopped, and then recommenced, the Agencies have found the operation ceased to be "ongoing," and the exemption no longer applies.

Many farming and ranching operations cannot qualify for the "normal" exemption, as interpreted by the Agencies, because they have not been continuously conducted at the same location since 1977. Under the proposed rule, these operations will be subject to section 404 permit requirements (and potential Clean Water Act enforcement and penalties) for moving dirt (plowing, planting, building fences, *etc.*) where those activities occur in low spots and drainage paths deemed to be *waters of the U.S.* under the proposed rule.

Another limitation on the scope of the "normal" farming exemption is the so-called "recapture" provision. Under this provision, the normal farming exemption does not apply to any activity "having as its purpose bringing an area of navigable water into a use to which it was not previously subject, where the reach of navigable waters may be impaired or the reach of such waters be reduced" (*i.e.,* converting wetland to non-wetland so as to make it amendable to crop production).[9] Put differently, where discharges of dredged or fill material are used to bring land into a *new use* (*e.g.,* making wetlands amenable to farming) and *impair the reach* or *reduce the scope* of jurisdictional waters, those discharges are not exempt.

---

[4] 33 U.S.C. § 1344(f)(1).

[5] 33 U.S.C. § 1344(f)(1)(A).

[6] 33 CFR § 323.4(a)(1)(ii); 40 CFR § 232.3(c)(1)(ii)(A).

[7] *See, e.g., United States* v. *Cumberland Farms of Conn., Inc.,* 647 F. Supp. 1166 (D. Mass. 1986), *aff'd* 826 F.2d 1151 (1st Cir. 1987).

[8] Despite multiple inquiries during the public comment period on the proposed rule, the Agencies have so far refused to publicly confirm or deny this point. In at least one private meeting, however, high ranking EPA officials have confirmed that farming (in a jurisdictional feature) that has not been ongoing since 1977 would require a section 404 permit, but only "for the first year" (after which it would be deemed an "established" operation). *See* Letter from Craig Hill, President, Iowa Farm Bureau, to Ken Kopocis, Deputy Assistant Administrator, U.S. EPA Office of Water (Sept. 29, 2014) (*http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-7633*).

[9] 33 U.S.C. § 1344(f)(2).

The Agencies have broadly interpreted the "recapture" provision to apply even when the "new use" is simply a change from one crop to another crop.[10] But the greatest expansion yet would result from the current proposed rule. If "*waters of the United States*" include land features as subtle as an ephemeral drainage path running across a farm field—or small, isolated wetlands in a field—even ordinary plowing could easily "impair" the reach or "reduce" the scope of those purported "waters." In fact, in the preamble to the proposed rule, the Agencies admit that if farming has eliminated a bed and bank where one previously existed (*e.g.,* cultivation has smoothed the gradient on a farm field, eliminating a subtle channel), the Agencies would view that as "converting" a jurisdictional water into a "nonjurisdictional water."[11] Any such action—including ordinary plowing—would violate the Clean Water Act in the Agencies' view.

3. Section 404(f) Exemption for Construction or Maintenance of Farm Ponds

A third important agriculture-related exemption is the exemption in section 404 for "construction or maintenance of farm or stock ponds or irrigation ditches."[12] This provision exempts any discharge of dredged or fill material into *waters of the U.S.* for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches. This exemption, however, like the "normal" farming and ranching exemption, is subject to the "recapture" provision.[13]

Through guidance and enforcement actions, the Corps and EPA have interpreted the farm pond exemption narrowly and applied the so-called "recapture" provision broadly. In the Agencies' view, impounding a jurisdictional feature is an unlawful discharge of dredged or fill material, and the resulting impoundment is itself a "water of the U.S."[14] In the experience of many farmers, the recapture provision essentially swallows the farm pond exemption. Where farm or stock pond construction has involved wetlands or small ephemeral drainages later deemed to be jurisdictional "tributaries," farmers have been ensnarled in enforcement.

The proposed rule will further limit farmers' and ranchers' ability to build and maintain farm ponds. While some farmers have already been harmed by "case-by-case" determinations that impounded ephemeral drainages were jurisdictional tributaries, the proposed rule would establish *categorical jurisdiction* over virtually any ephemeral drainage as a "tributary." Thus, any impoundment of those features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will be a water of the U.S. Likewise, any construction of a farm pond in a small low spot (wetland) now deemed to be jurisdictional will also require a section 404 permit and the resulting pond will also be a water of the U.S.

This aspect of the rule will affect countless (maybe most) farm and stock ponds—of which there are millions. By expanding jurisdiction to include common ephemeral drainages and isolated wetlands, the rule will prohibit the impoundment of these natural drainage or depressional areas—which is often the *only* rational way to construct a farm or stock pond. Farm or stock ponds are typically constructed at natural low spots to capture stormwater that enters the pond through sheet flow and ephemeral drainages. Depending on the topography, pond construction may be infeasible without diking a natural drainage path on a hillside. For that reason, the proposal's exclusion for "artificial lakes or ponds created by excavating and/or diking *dry land* and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" is almost meaningless. "Dry land" would exclude anything that qualifies as a wetland or any ephemeral feature where stormwater naturally channels—presumably even nonjurisdictional wetlands or ephemeral features. This leaves little "dry land" available for any rational construction of a farm pond. Farm and stock ponds are not excavated on hill tops and ridges. They are excavated at low spots where water naturally flows and collects. Thus, the proposed expansion of jurisdiction would render the farm pond exclusion meaningless, and the proposed regulatory exclusion for certain farm or stock ponds would provide no relief for most farmers and ranchers.

* * * * *

Countless farmers and ranchers nationwide urgently need the assistance of this Committee to avoid the harmful effects of this proposed rule. Thank you for your

---

[10] *See, e.g., http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx#farming* (Corps Sacramento district website discussing normal farming exemption).

[11] 79 *Fed. Reg.* at 22204, n. 8.

[12] 33 U.S.C. § 1344(f)(1)(C).

[13] *Id.* § 1344(f)(2); *see* also 33 CFR § 324.3(c).

[14] *See* 79 *Fed. Reg.* 22188, 22201 (April 21, 2014).

consideration and for any action you take to ensure that the effects of this rule on farmers and ranchers are fully considered.

The CHAIRMAN. Thank you so much for your testimony.

Mr. Gledhill, please go ahead and proceed for 5 minutes when you are ready.

STATEMENT OF JONATHAN GLEDHILL, PRESIDENT, POLICY NAVIGATION GROUP, ANNANDALE, VA; ON BEHALF OF WATERS ADVOCACY COALITION

Mr. GLEDHILL. Thank you, Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Committee. Thank you for inviting me to testify on how EPA's rulemaking will affect the USDA's agricultural programs, especially the ones in the jurisdiction of your Committee.

My testimony today stems from two experiences. First, I represent the Waters Advocacy Coalition, a large coalition of cross-section of the nation's construction, real estate, mining, manufacturing, energy, and agriculture and forestry sectors. The coalition is deeply concerned with how this proposal could stymie growth and opportunity throughout our economy, and especially in rural America. Second, I have the honor as serving as a career official in the Office of Information and Regulatory Affairs, and the Office of Management Budget. My responsibility in OIRA was to determine how EPA draft regulations and policies affect our national welfare, and the budgets and missions of other Federal agencies.

From these twin streams of experience, I am very concerned that EPA is rushing forward with a rulemaking without considering the full ramifications, and without fully estimating the benefits and costs of this proposal. USDA's recent budget submission, performance plan, and other program analyses do not evaluate how the WOTUS rule will increase the cost, and will reduce the performance of USDA programs. From my own analysis, the impact on USDA programs will be significant and complex.

As you have heard this afternoon, the cost of the WOTUS rule is multifold. Some of the costs have been mentioned about the permitting, but let me mention some other ones, that once you define something as the *Waters of the United States*, many other provisions of the Clean Water Act apply. The spill protection requirements, the water quality standards, the anti-backsliding provisions, and the citizen suit provisions. We just heard about the citizen suit provisions, how they can enforce the Clean Water Act in place of EPA or the states. Anti-backsliding means that once a permit is set, so once a farmer has a cropland, has a discharge that is permitted, they can't make that change and make any change to that crop. Farmers are constantly innovating, they are constantly adding new crop protection programs, new crops, new techniques. This would stymie and make changes in land use more difficult.

So what are the implications for rural America? Well, as we have heard, farmers and landowners have a choice. They can either cede jurisdiction of their land to Federal permitting, or they get—acquire—spend the money to acquire those Federal permits. Those costs are significant. EPA estimates it to be $57,000 at a minimum. The WAC has submitted and other experts have submitted testimony that they would be hundreds of thousands of dollars in cer-

tain cases, just to obtain and allow the same practices that currently happen today.

But that is not all. We heard a lot through the testimony about uncertainty. Well, uncertainty affects one of the other vital elements of rural America and farming: financing. Our financing for farming is a shared risk between farmers, commercial private institutions and the Federal Government. If there is uncertainty, that financing dries up, and that makes it very hard for farmers to have certainty so that they can move forward.

So if we look at those costs of both uncertainty and of permitting on USDA, how does it ripple through? Well, there are several things. First, there is an effect on crop insurance demand. The recent farm bill elevated crop insurance as the main means to share farming risk in this nation. As farmers face higher cost and look at greater risks, their use of farm insurance will change—crop insurance will change. The academic literature says this interaction is complex. USDA, because this is so vital to our farming program and our farming policy, needs to look at the impact of this rulemaking on crop insurance demand and cost. There will certainly be a greater demand for farm operating loans. USDA farm operating loans serve as a vital safety net when farmers cannot obtain credit from commercial sources. This program offers a lifeline to many farmers. With an average loan of $57,000, and $1.25 billion obligated, you can see many farmers take advantage of this program. As the WOTUS increases the cost of farming, the opportunities and the risks to these programs will increase. Certainly, we will hear from others about other infrastructure programming that USDA supports in rural America, be it telecommunications, energy. The more project risk increases, the more the risk of default and other cost to USDA.

Certainly familiar to this Committee is the management of U.S. forests. Forest—land managers must comply with this rule in the same way the private sector does. The Forest Service will have to redo its NEPA analyses to establish jurisdiction, and to decide the impact as part of its managers the multiple uses of National Forest. Right now, just since October, there are 14 pending EISs that will probably have to be stopped and reevaluated based on the jurisdictional changes in this rulemaking, and that will ripple through the hundreds of U.S. forests as each land manager tries to make the right decisions in compliance with the rule.

Finally, and just in conclusion, there is little evidence that USDA has considered these impacts. If you look at the budget documents, the performance plans, the financial analysis OMB does of credit programs that have all been submitted in the last 2 months to Congress, none of the effect of WOTUS is considered in this rulemaking.

So what do we do? What can this Committee do? Well, USDA has opportunities in the interagency process under OMB to raise its concerns. This Committee could ask questions of USDA officials that are they—do they understand the budget impacts, do they understand the additional demands on USDA programs from this rulemaking, and have they brought those up, because policy officials can only make decisions when they have information. The White House, Congress, and USDA can't understand if they haven't

done the analysis. So this Committee can play an important role to have those questions answered.

I am running out of time but I would say that, Ranking Member Lujan, you raised a great question about supplemental *versus* withdrawal, and the Representative from Tennessee raised a question about the economic impact. I would be happy to answer those questions, time permitting.

Thank you for the opportunity to testify today.

[The prepared statement of Mr. Gledhill follows:]

PREPARED STATEMENT OF JONATHAN GLEDHILL, PRESIDENT, POLICY NAVIGATION GROUP, ANNANDALE, VA; ON BEHALF OF WATERS ADVOCACY COALITION

Chairman Thompson, Ranking Member Grisham, and Members of the Committee, thank you for inviting me today to testify on how the United States Environmental Protection Agency's (EPA) and the United States Army Corp of Engineers' "*Waters of the United States*" (WOTUS) proposed rule will affect United States Department of Agriculture (USDA) programs, especially those in the jurisdiction of your Committee.

My testimony today stems from two experiences. First, I represent the Waters Advocacy Coalition (WAC), a large cross-section of the nation's construction real estate, mining, manufacturing, energy, public health and safety, agriculture and forestry sectors. The Coalition is deeply concerned with how this proposal could stymie growth and opportunity throughout our economy and especially in rural America. Second, I had the honor of serving as a career official in the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). My responsibility in OIRA was to determine how EPA draft regulations and policies affect our national welfare and the budgets and the missions of other Federal agencies.

From these twin streams of experience, I am very concerned that EPA is rushing forward with a rulemaking without considering the full ramifications and without fully estimating the social benefits and costs. USDA's recent budget submission, performance plan, and other program analyses do not evaluate how the WOTUS rule will increase the cost and will reduce the performance of USDA programs. From my own analysis, the impacts on USDA programs will be significant and complex.

Based on the Administration's stated schedule for this rule, there isn't enough time for USDA understand the implication for USDA programs in the jurisdiction of this Committee. EPA's leadership has stated that they plan to issue the final rule this spring. Under the Executive Order for regulatory review issued by this Administration, OIRA only has 60 days to 90 days to review the draft final WOTUS rule. To avoid the adverse effects of this rulemaking on USDA and rural America, EPA and the Corps should re-propose other regulatory alternatives and reanalyze their social benefits, social costs, and Federal budget impacts.

The WOTUS Rulemaking Will Increase Costs and Uncertainty for Farming and for Services in Rural America

While the Committee has heard these costs described from other witnesses this morning, let me summarize the major ones:

- Expanding jurisdiction under regulation to most ditches, ephemeral streams, and lands containing adjacent waters will increase the land available that can only be farmed under Federal permitting conditions.
- While much attention has been paid to the rule's expansive definitions of wetlands, the rulemaking has implications far beyond wetland permitting. The regulatory definition triggers many other expansive and expensive provisions of the CWA including the following:
  - Permitting for discharges in *waters of the United States*.
  - Spill Protection Requirements.
  - Water Quality Standards.
  - Anti-backsliding provisions.
  - Citizen suit provisions.

The last two deserve some mention. Under the Clean Water Act, once effluent permit limits are established, they cannot be made less stringent even if the initial environmental problem has been solved. Whatever the value of this "anti-back-

sliding" provision is for industrial discharges, it certainly does not fit well for farming, grazing, and other active land uses. Farmers innovate constantly—new seeds, new crops, new pest control systems, new equipment. Under the CWA, if a farmer must seek a CWA permit for any runoff into a ditch, those limits become binding in the future. It may become very difficult to grow a new crop and remain in compliance with permit based on the previous crop.

The threat of citizen suits is not a false scare. It has been said that EPA and the Corps will not change their jurisdictional determinations, allowing current land uses to continue. This argument ignores the consequences of regulation. Under the CWA, authorized states must establish water quality standards for all *waters of the United States* and permit discharges into these waters. On behalf of EPA, citizens can sue potential dischargers and the states for failure to comply with permitted conditions or for failure to establish standards under the CWA. Once most ditches become *waters of the United States*, citizen groups can file suit against adjacent land owners for unpermitted discharges. Just last month, citizen groups in California gave notices to hundreds of businesses and property owners that they intend to sue these business if they are not in compliance with an upcoming CWA stormwater rule.

Implications of these Regulations for Rural America

The vast number of land owners who own, or are adjacent to, jurisdictional waters face a difficult choice. They can either cede control of the land to Federal jurisdiction or they can pay significant permitting costs to maintain the current use. Let's explore each choice. If they cede control of the land now deemed water of the U.S., they will lose production from that land. More significantly, they likely will also have lower yields on their remaining nonjurisdictional land. For example, to receive a discharge permit for pesticide application adjacent to a *waters of the U.S.*, farmers will need buffer zones or engineering barriers to prevent discharge to these jurisdictional waters.

On the other hand, if they seek to maintain their current use, they must pay to obtain Federal permits. Obtaining these permits are not cheap—EPA estimates that they are at least $57,000. The WAC has submitted data to EPA to show that these costs are much higher than EPA's estimates. In addition to the permitting cost, farmers will then have to pay to comply with the permit. These compliance costs include monitoring, reporting, wetland mitigation purchases, and other costs. As EPA states in its economic analyses for other rulemakings, these costs can easily exceed hundreds of thousands of dollars.

Whether a farm's revenue goes down or its costs go up, the bottom line is the same—the rulemaking will reduce the nation's net farm income.

But that isn't all. There is another cost that often doesn't receive as much attention, but is extremely important for farmers. Uncertainty. This rulemaking increases farming uncertainty both in terms of time and space. Permit applications and permit approval takes time. The Corps of Engineers' or EPA's permit approval process is not aligned to, or as predictable as, the growing season. There is also uncertainty in space, *i.e.,* the extent of EPA's asserted jurisdiction. Since EPA's definitions are not clear, farmers face some uncertainty where they can plant without prior approval.

Uncertainty matters because of another vital ingredient in farming and in rural America, affordable and available financing. Our nation has a long tradition of loss mitigation and shared risk between the farmer, commercial financial institutions, and the Federal Government. In the face of this rule's negative and uncertain effects on farm income, private lenders are likely to charge higher financing costs or may cut off loans to certain farmers until the jurisdictional issues are resolved.

EPA has not considered the costs of uncertainty in its rulemaking. More importantly, USDA has apparently not either.

Effect of the WOTUS Proposed Rule on USDA Programs

EPA's rulemaking conflicts with USDA's mission to promote rural America's prosperity. Here are just some of the impacts on USDA programs:

- **Greater Demand for Crop Insurance.** As farmers' costs increase and income uncertainty increases due to this rule, they will sensibly pay to reduce their overall risk in other areas. Farmers then are likely to increase their coverage under Federal crop insurance programs. USDA has experienced increased demand for coverage over time as other revenue risks (*e.g.,* trade restrictions) have increased.
- **Greater Demand for Farm Operating Loans.** USDA's farm loan programs serve as a safety net when farmers cannot obtain credit from commercial sources. This program offers a lifeline to a large number of farmers—with an average loan size of $57,000, the $1.25 billion in obligations goes a long way.

As the WOTUS rule reduces net farm income for many farmers, their balance sheets will be stressed. More farmers will seek USDA's farm operating loans. Unfortunately, more farmers will be unable to keep current on their existing Federal loans. When net income falls, delinquency rates and thus Federal budget costs.

- **Greater Demand for Other Rural Infrastructure Financing.** USDA supports investments in rural infrastructure for telecommunication, energy, and education. USDA has multiple grant, loan guarantee, and loan programs to share rural development risk. This rulemaking increases infrastructure project cost and uncertainty and thus will increase USDA's infrastructure support costs.
- **Greater Costs to Manage U.S. Forests.** USDA manages our nation's forest resources for their multiple uses. The Forest Service must comply with NEPA in its use decisions. As with farmers, the Forest Service will must comply with the rule and evaluate the new extent of jurisdictional waters on or adjacent to its land. Past jurisdiction decisions under NEPA will likely be need to be revised due the rule. For example, the Forest Service has submitted 14 draft EIS for public and EPA comment since the beginning of October. Conducting new evaluations for these EIS documents will increase Federal spending and potentially delay using our forest resources.
- **Greater Demand for NRCS Decisions.** The USDA's Natural Resources Conservation Service (NRCS) plays two important roles in this rule. First, the 2014 Farm Bill make eligibility for all Federal assistance dependent upon complying with NRCS's wetland determinations. The stakes are incredibly high for this compliance. Violations on one field disqualifies farmers from Federal assistance on all of their fields. Therefore, farmers have strong incentives to seek NRCS determinations for their fields and to follow them.

  It is worth noting that the proposed WOTUS rule adopts a different definition of wetland than NRCS regulation. Last month, NRCS called for comment on State Offsite Methods for several states that outline procedures for NRCS staff to make remote wetland determinations. These NRCS proposals make no mention of EPA's proposed rule, even though they are both wetland delineations. As a result, we are heading to a future where farmers must farm based on two sets of maps—one determining their eligibility for Federal farm programs and the other determining their legal compliance with the *waters of the United States* rulemaking.

  Second, it is not only NRCS' responsibilities for its wetland determinations, but the responsibility EPA gave it for EPA's determinations. In its interpretive rule published with the proposed rule, EPA and USDA put forth limited exemptions from compliance with section 404 of the Clean Water Act for normal farming operations provided farmers follow approved NRCS management plans. Given the substantial fines possible under the CWA, farmers will move to ensure that NRCS staff explicitly approve their plans. Commercial lenders are in turn likely to insist on NRCS approved plans prior to approving financing.

  For these reasons, NRCS staff will face significantly greater demands for their time. Since their decisions will have greater consequences, NRCS staff will have less time to pursue their other responsibilities that are of great interest to this Committee.

Little Evidence That USDA is Considering These Impacts

USDA has given little public indication that they are planning for these consequences. However, we do know that USDA's recent public documents do not anticipate or quantify the rule's impacts on USDA programs. For example:

- There is no mention of this rule's effect in USDA's FY 2016 budget request. In fact, the Administration proposes to reduce NRCS's budget authority in 2016 at the time when farmers will need their services more.
- There is no mention of this rule's effect in USDA's Performance Plan. The broad breadth of the rulemaking's effect on USDA programs receives no mention.
- There is no mention of this rule's effect in OMB's Federal Credit Supplement to the FY16 Budget Submission. Since OMB projects the default rate to increase by 50 percent in FY 2015 as compared to FY 2014, accounting for the effect of the additional financial burden of this rule in FY16 would be prudent financial planning.

Recommendations

In addition to its public planning documents, USDA has opportunities within the interagency regulatory review process to raise the WOTUS rulemaking's effect on its programs. For more than 30 years, each President has required Federal agencies to submit draft regulation to OMB for review. OMB coordinates interagency review of each regulation, allowing other agencies to review the impact on their programs and mission. Policy officials and the public can then see the trade-offs. For it is not a choice of environmental protection or rural development, but rather how can we use America's limited resources as efficiently as possible to achieve a mix of both policy goals.

However, policy officials can only make these trade-offs if they have information. And the timeframe is limited—the Executive Order only give OMB 60 to 90 days to review even regulations with profound economic impacts. USDA must be ready and active advocate for rural America during this review.

This Committee can ensure USDA participates actively in the Executive branch interagency review by asking senior officials these questions:

- ➢ What are the budget impacts of the rulemaking on USDA programs and loan guarantees in FY16?
- ➢ What are the additional demands on USDA personnel from EPA's rulemaking?
- ➢ Has USDA offered alternatives to EPA and OMB to lessen the impact of EPA's proposal on farmers, the rural American economy, and USDA?

If USDA officials are not prepared to answer these questions, then the rulemaking is not ready to have the force and effect of law. The Administration then should reconsider the proposal, fully analyze its potential economic effects as required by law and Executive Orders, and ask for additional public comment.

Members of the Committee, thank you for the opportunity to speak to you today on this important topic. I would be happy to answer any questions you may have.

The CHAIRMAN. Thank you, sir. I appreciate your testimony.

Mr. Biggica, whenever you are ready, please go ahead and proceed with 5 minutes.

STATEMENT OF RUSSELL J. BIGGICA, DIRECTOR OF GOVERNMENT, LEGISLATIVE AND ECONOMIC DEVELOPMENT, PENNSYLVANIA RURAL ELECTRIC ASSOCIATION, HARRISBURG, PA

Mr. BIGGICA. Thank you. Chairman Thompson, Ranking Member Lujan Grisham, Members of the Subcommittee, my name is Russ Biggica, and I am the Director of Government and Regulatory Affairs for the Pennsylvania Rural Electric Association. PREA is a nonprofit service organization that is headquartered in Harrisburg, and represents 14 electric cooperatives in Pennsylvania and New Jersey that supply electricity to 230,000 rural households, representing more than 600,000 consumers.

PREA has significant concerns with the rule as proposed by EPA and the Army Corps. As the agencies try to establish greater clarity for the authority and jurisdiction of the Clean Water Act, we are concerned that new and broadly-defined regulatory definitions will create more confusion, unnecessary Federal jurisdiction, and greater and unnecessary cost.

As the matter has risen to an issue of national concern for the 900 cooperatives in 46 states throughout the country, I have talked with a number of our cooperative engineers who are responsible for line construction and maintenance, and in those discussions and the shared information that we have with one another, we have the same concerns regarding definition clarity, jurisdictional expansion, and the cost-benefit problems that these regulations present to us.

A couple of examples from these conversations with these engineers who do our maintenance—our constructions and mainte-

nance, they said that the proposed broadly-defined term for *tributary* and *all waters* in *floodplains* and *riparian areas* are now considered *adjacent waters.* This broad-brush definition would capture many features commonly found on rural land already. Such definition expands Federal jurisdiction, and would effectively eliminate a general nationwide permit already established by the Corps for utility line activities in and around existing *waters of the United States*. These permits and the limits that they propose, we would not be able to ascertain under these new guidelines.

Another concern we have under the proposed rules is that our rights-of-ways may be considered *Waters of the United States*, even though they are often simple ditches alongside roads, and are rural, and that is all you ever see, that receive road and water runoff and infrequently hold that water. Though we have been told that the rule exempts ditches that drain only upland, and are constructed upland, but the term itself *upland* is not defined within the regulations. Again, confusion and uncertainty, and I can go on and on, really relate to excess cost and increased cost.

I can also talk, but it is in my testimony, about the uncertainty when it comes to granting general permits for vegetation control throughout our cooperative area. Broadly stated, any increase in Federal jurisdiction would cause greater hardship and greater costs with these permits. As you know, Congressmen, we as a distribution entity of electricity, reliability and safety is our major concern. Any increased cost in providing reliable and safe electricity to our members would be a hardship for our consumer members who are our owners. In rural Pennsylvania, we average about seven consumers a mile. Our cousins, the investor-owned utilities in Pennsylvania, average about 42. So we have seven people paying for our mile distribution line, as opposed to an IOU paying for that same mile with 44 consumers. Any cost inordinately affects us greater than any other utility in Pennsylvania. Cost does matter.

In conclusion, the Rural Electric Cooperative would like to see and recommend that EPA and the Corps withdraw and re-propose the rule to provide clean limitations on the scope of the Clean Water Act. Doing so will allow the agencies to better understand the impacts to small businesses like rural electric cooperatives, and hopefully alleviate the cost created by this ever-expanding and overreaching regulation.

I would like to thank the Subcommittee for allowing me to testify today. Thank you.

[The prepared statement of Mr. Biggica follows:]

PREPARED STATEMENT OF RUSSELL J. BIGGICA, DIRECTOR OF GOVERNMENT, LEGISLATIVE AND ECONOMIC DEVELOPMENT, PENNSYLVANIA RURAL ELECTRIC ASSOCIATION, HARRISBURG, PA

Introduction

Chairman Thompson, Ranking Member Lujan Grisham, Members of the Subcommittee, thank you for inviting me to testify today on the definition of the "*waters of the United States*" (WOTUS) proposed rule and its impact on rural America. Since 1942, the Pennsylvania Rural Electric Association (PREA) has served as the unified voice for electric cooperatives in Pennsylvania and New Jersey. PREA is a nonprofit, service organization headquartered in Harrisburg, Pa., and is governed by a 14 member board of directors. Today, 14 electric cooperatives in Pennsylvania and New Jersey supply electricity to more than 230,000 rural households, businesses and industries, representing more than 600,000 consumers.

As locally owned and locally controlled businesses, electric cooperatives play vital roles in maintaining the economic health of their rural communities—providing jobs and contributing to the overall quality of life. Established to provide reliable electric service to their member-owners at the lowest reasonable cost, electric cooperatives are private, independent electric utilities owned by the members they serve, each governed by a board of directors elected by and from the membership. Access to affordable energy resources is especially important to residents of rural communities who already spend more per capita on energy than citizens in more populous areas.

Electric co-ops' operating costs are borne by our member-owners—not investors—and many of our member-owners already experience challenging economic circumstances. Nine out of ten electric cooperative member-owners have average household incomes below the national average, and more than seven million Americans served by electric cooperatives live below the poverty line. In fact, cooperatives serve 90 percent of the nation's persistent poverty counties (*i.e.,* those with deeply entrenched poverty rates consistently 20 percent above the national average for the last 3 decades).

PREA's Concerns with the "*Waters of the United States*" Proposed Rule

PREA has significant concerns with the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to revise the definition of WOTUS under the Federal Clean Water Act (CWA), especially the expanded universe of features that would become WOTUS. Electric cooperatives in Pennsylvania own and maintain about 12.5 percent of the electric distribution lines in the state, covering nearly ⅓ of the Commonwealth's land area in 42 counties. These lines, an essential component of rural business and industry, represent one of the Commonwealth's largest non-governmental investments in rural infrastructure.

Several activities associated with providing electric service require Federal CWA permits. The proposed rule would necessitate even more permits. Power lines require regular maintenance, including necessary repair and replacement of poles and towers. In addition, these facilities require upgrades to make the system more resilient in the event of severe weather events. As our members increase generating capacity to meet the growing demands of our members and to invest in generation from other fuels including renewables, electric cooperatives in Pennsylvania and elsewhere will need to build new transmission and distribution infrastructure.

Serving some of the least densely populated areas of the country requires an expansive network of power lines for both electric transmission and distribution. The Corps has a nationwide permit (NWP 12) for utility line activities that allows co-ops to construct and maintain power lines so long as each "single and complete" project—each separate and distinct crossing of a WOTUS—does not result in the loss of more than ½ acre of WOTUS. Cooperatives configure lines and structures to avoid many wetland and streams to stay within the half acre limit. However, the broad proposed definition of "tributary" and assertion that all water in floodplains and riparian areas are "adjacent" waters would capture many features commonly found on rural land spanned by cooperative power lines. Such a broad expansion of jurisdictional waters would significantly limit, if not eliminate, cooperatives' ability to stay within the nationwide permit limits, potentially rendering the nationwide permit useless.

More permitting—especially more individual permitting—increases uncertainty, delay, and ultimately the cost of constructing and maintaining power lines. An individual permit can be expected to cost ten times as much as a general permit, and take twice as long to obtain. In many cases, increased delay and increased costs can make the difference between proceeding with, delaying, or canceling a project. The economic challenges faced by our members underscore the importance of a cost-effective regulatory program. A ten-fold increase in cost of permitting to construct and maintain critical infrastructure with no appreciable environmental benefit is not cost-effective.

PREA believes the broad categories and ambiguous definitions in the proposed rule will vastly expand the reach of the CWA. Under the proposed rule, our rights of way may be considered WOTUS, even though they are often simple ditches alongside roads that receive road run-off and infrequently hold water. EPA and the Corps have said that they are exempting ditches that drain only upland and are constructed in uplands, but the term "upland" is not defined. This gives the Federal Government the final say on whether or not ditches are eligible for the exemption.

To maintain the reliable delivery of electricity, cooperatives must maintain rights of way, keeping them clear by controlling vegetation which may include the use of herbicides. Electric cooperatives must control vegetation around generating facilities and substations as well. Permits are required if herbicides are applied in WOTUS,

so an expansion of WOTUS as described in the proposed rule will also increase the requirement for vegetation control permits. EPA and states have issued general permits for vegetation, but if you spray more than 20 linear miles, there are added burdens. And, if the area is considered a WOTUS or potential habitat for endangered species, there will be even more requirements, all triggered by the assertion of Federal jurisdiction.

Concerns of Small Business

The proposed rule will impose significant costs on small businesses, including electric cooperatives. All distribution cooperatives, and all but three generation and transmission cooperatives, meet the Small Business Administration definition of a small business. The typical distribution co-op serves 13,000 consumers and, on average, seven customers per mile of electric distribution line—far fewer than the national average of 34 customers per mile of distribution line for investor owned utilities and 48 customers per mile for publicly owned utilities (municipals).

PREA agrees with the findings of the Small Business Administration Office of Advocacy (SBA Advocacy) that the EPA and the Army Corps of Engineers improperly certified the rule as not posing a significant economic impact on a substantial number of small entities. We also agree with SBA Advocacy that the agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities. Furthermore, the EPA erred in not conducting a small business advocacy review (SBAR) panel in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA).

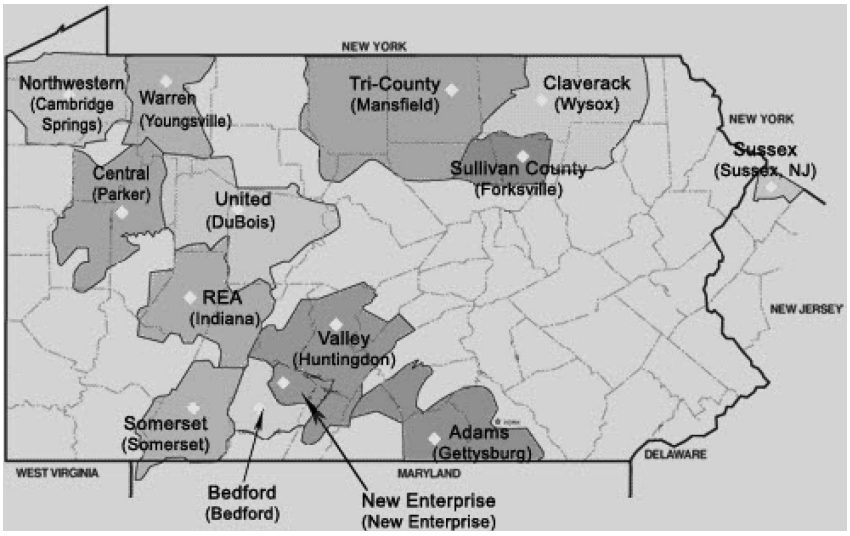
Conclusion

Electric cooperative members value, and deserve, a healthy environment. Affordable and reliable electricity is also an interest of critical importance to our members and the nation. As electric cooperatives work to harmonize these interests on behalf of our members, maintaining the electric infrastructure on which our member owners rely, we cannot afford the delays and additional red tape this proposed rule would create. The increased costs and lengthy permitting for constructing and maintaining power lines imposed by the proposed rule would result in little—if any—enhanced protection for the nation's waters.

The economic challenges faced by so many cooperatives and their member-owners underscore the importance of a cost-effective regulation. The proposed rule is not cost-effective and will impose significant economic impacts on a substantial number of small entities, including electric cooperatives. We call on EPA and the Corps to withdraw the proposal and engage in a meaningful dialogue with all stakeholders, including electric cooperatives and others that provide essential services to the rural community.

I appreciate the invitation to testify and would be happy to address questions from the Committee on this important issue.

Pennsylvania/New Jersey Territorial Map



The CHAIRMAN. Well, thank you so much for your testimony.

Mr. Taylor, go ahead and proceed whenever you are ready for 5 minutes of testimony.

STATEMENT OF SLEDGE TAYLOR, COTTON, CORN, SOYBEAN, WHEAT, SORGHUM, AND PEANUT PRODUCER, COMO, MS

Mr. TAYLOR. Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee, thank you for the opportunity to offer our views regarding the EPA and the Corps of Engineers' proposed rule to define *Waters of the United States* under the Clean Water Act.

My name is Sledge Taylor, and my family and I raise cotton, corn, soybean, wheat, peanuts, and cattle in Como, Mississippi, and I also served this year as the Chairman of the National Cotton Council.

It is our belief that the proposed rule will result in Federal permit requirements for many commonplace and essential farming practices. This will result in farmers like myself being forced to endure even more costly regulations, and place many of us at risk for fines from agencies, or facing a citizen suit for normal farming practices. In both the proposed rule and the agencies' marketing campaign aimed at selling the proposal to farmers, they paint two misleading and contradictory pictures. First is the attempt by two Federal agencies to make only minor tweaks. The second picture is more critical, where the proposed rule purports to protect roughly 60 percent of the nation's flowing rivers, lakes, wetlands, and drinking water sources, which have been left vulnerable by state inaction and the Supreme Court's confusing opinions. The proposed rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by providing the agencies with almost unlimited authority to regulate at their discretion any low spot where water—rainwater collects, including common farm ditches,

ephemeral drainages, and agricultural ponds found in and near farms across the nation.

The proposed rule defines terms like *tributary* and *adjacent* in ways that make it impossible for a farmer to know whether the specific ditches or low areas at their farm will be deemed *Waters of the U.S.* These definitions are broad enough to give regulators and citizen plaintiffs plenty of room to assert that such areas are subject to Clean Water Act jurisdiction. Given the breadth of the definitions in the proposed rule, the vast majority of ephemeral drainage features and ditches on farmlands would be categorically regulated as jurisdictional tributaries. The vast majority of ponds and puddles would either be categorically regulated as adjacent waters, or could still be regulated as other waters. With the exception of very narrow section 404 exemptions, any discharge of a pollutant such as fertilizer into the ditches will be unlawful without a permit.

If low spots in farm fields are defined as jurisdictional waters, a Federal permit will be required for farmers to protect their crops. The same goes for the application of fertilizer. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 permit.

I farm in the Delta and in the hill regions of Mississippi. Our area has soils that have very little internal drainage, so water must drain across the land to adjacent ditches and streams. As a standard agricultural practice we use an implement called a water furrow plow to better define a small drain through these depressions deemed working lands by the USDA. This allows water from storm events to drain more quickly. Since these areas are normally dry, except during extreme storm events, we plant through these areas, and the approximately 6″ deep depressions we create with a water furrow plow. In addition, we apply crop protection products and fertilizer when needed on the plants that grow in these areas.

The proposed rule, by its terms, extend permit requirements to water furrows. If these small drains become regulated, producers will not be able to apply needed inputs to raise a crop within 100′ or more of these drains.

I have served on my county's NRCS Committee for 25 years, and appreciate the importance of USDA's voluntary conservation programs. On my farm we have utilized the EQIP and CSP Programs. Many farmers have worked with NRCS to implement land-leveling practices on their operations. Water quality data clearly show these land-leveling practices significantly reduce non-point source pollutants. Under this proposed rule, these practices will require permits which will require mitigation, which will make these voluntary conservation measures too costly to implement, even with financial assistance.

Everyday farming activities in or near ephemeral drainages, ditches, or low spots could be a violation of the Clean Water Act unless a costly permit is obtained. The tens of thousands of dollars of additional cost for Federal permitting of ordinary farming activities is beyond the means of most farmers and ranchers, the vast majority of whom are family-owned, small businesses.

The agencies have made promises to make significant changes to the rule, and this is a positive step. Given the amount of pubic in-

terest in this rule, we strongly encourage the agencies to release the revised rule again for public comment. The Clean Water Act involves an extremely complex set of rules and regulations, and it is important for rural America to have ample input into any final rule. It is clear that this rule will have significant impact on rural America and production agriculture.

I thank this Committee for its diligence in defending agriculture, and appreciate the opportunity to testify on this important issue. And I would be pleased to respond to any questions.

[The prepared statement of Mr. Taylor follows:]

PREPARED STATEMENT OF SLEDGE TAYLOR, COTTON, CORN, SOYBEAN, WHEAT, SORGHUM, AND PEANUT PRODUCER, COMO, MS

I would like to thank Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee for the opportunity to offer our views regarding the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (together, "the Agencies") proposed rule to define "*waters of the United States*" under the Clean Water Act (CWA). My name is Sledge Taylor, and my family and I raise cotton, corn, soybeans, wheat, peanuts and cattle in Como, Mississippi and in addition to other duties I also serve this year as the Chairman of the National Cotton Council.

It is our belief that the proposed rule will result in Federal permit requirements for many commonplace and essential farming practices. This will result in farmers like myself being forced to endure even more costly regulations and place many of us at risk for fines from the Agencies or facing a citizen suit for normal farming practices.

In both the proposed rule and the Agencies' marketing campaign aimed at selling the proposal to farmers, ranchers and the general public, the Agencies paint two misleading and contradictory pictures. First is the attempt by two Federal agencies to make only minor tweaks to increase the "clarity" and "certainty" of a regulatory scheme long accepted by landowners and businesses. Under this scenario, the rule merely clarifies and provides certainty for a regulatory scheme needlessly muddled by the U.S. Supreme Court. So minor is the impact on landowners, the Agencies claim that the proposed rule would impact a mere 1,332 acres nationwide under the section 404 program. The second picture is more critical, where the proposed rule purports to protect roughly 60% of the nation's flowing rivers, lakes, wetlands, and drinking water sources, which have been left vulnerable by state inaction and the Supreme Court's confusing opinions.

The proposed rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by providing the Agencies with almost unlimited authority to regulate, at their discretion, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds, and isolated wetlands found in and near farms and ranches across the nation. The proposed rule defines terms like "tributary" and "adjacent" in ways that make it impossible for a typical farmer or rancher to know whether the specific ditches or low areas at his or her farm will be deemed "*waters of the U.S.*" These definitions are certainly broad enough, however, to give regulators (and citizen plaintiffs) plenty of room to assert that such areas are subject to CWA jurisdiction. Moreover, no crisis exists. The Agencies do not argue that they need to regulate farming and ranching to protect navigable waters. Yet, the proposed rule gives them sweeping authority to do so, which they may exercise at will, or in response to a citizen plaintiff.

Farming and ranching are water-dependent enterprises. Whether they are growing plants or raising animals, farmers and ranchers depend upon water. For this reason, much of the farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation (some via ditches). There are many features on those lands that contain or carry water only when it rains and that may be miles from the nearest truly "navigable" water. Farmers and ranchers regard these landscape features as simply low spots in farm fields.

There are also features on farms and ranches that tend to be wet year round, but are not jurisdictional waters today. For example, many ponds are used on farms and ranches for purposes such as stock watering, providing irrigation water, or settling and filtering farm runoff. Additionally, irrigation ditches carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches are

typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water, and these ditches channel return flows back to those source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and ephemeral drainages.

Given the breadth of the definitions in the proposed rule, the vast majority of ephemeral drainage features and ditches on farmlands and pastures described above would be categorically regulated as jurisdictional tributaries under the proposed rule. The vast majority of small wetlands, ponds and pools (including, potentially, ephemeral ponds, which some might call "puddles") would be either categorically regulated as "adjacent" waters or could still be regulated as "other waters." Consequently, with the exception of very narrow section 404 exemptions, regulating drains, ditches, stock ponds, and other low spots within farm fields and pastures as "navigable waters" would mean that *any* discharge of a pollutant (*e.g.,* soil, dust, pesticides, fertilizers and "biological material") into those ditches, drains, ponds, *etc.* will be unlawful without a CWA permit.

This jurisdictional expansion will be disastrous for farmers and ranchers. Farmers need to apply weed, insect, and disease control products to protect their crops. On much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying such products. If low spots in farm fields are defined as jurisdictional waters, a Federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these "jurisdictional" features (even at times when the features are completely dry) would be unlawful discharges.

The same goes for the application of fertilizer—including organic fertilizer (manure)—another necessary and beneficial aspect of many farming operations. It is simply not feasible for farmers to avoid adding fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 National Pollutant Discharge Elimination System permit to fertilize their fields—and put EPA into the business of regulating whether, when, and how a farmer's crops may be fertilized. In fact, if low spots in fields and pastures become jurisdictional wetlands or tributaries, EPA or citizens groups could sue any time a farmer plows, plants, or builds a fence across small jurisdictional wetlands or ephemeral drains. Given the "very low" "threshold" the Agencies apply before "truly *de minimis* activities" turn into "adverse effects on any aquatic function," farmers and ranchers would even have to think about whether "walking or driving a vehicle through" a jurisdictional feature is prohibited. Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits) if such activities cause fertilizer, pesticides, or dirt to fall into low spots on the field, even if they are dry at that time.

I farm in the Mississippi Delta, and in the Oless hills of Mississippi. Our area has alluvial soils that have very little internal drainage so water must drain across the land to adjacent wetlands and streams. During storm events, water runs to shallow valleys in the middle of fields and slowly runs off. As a standard agricultural practice, we use an implement called a water furrow plow to better define a small drain through these depressions deemed "working lands" by the USDA. This allows water from storm events to drain more quickly. These shallow valleys rarely flood, except during extreme storm events, so we plant through these areas and the approximately 6″ deep depressions we create with the water furrow plow. In addition, we apply crop protection products and fertilizer when needed on the plants growing across these drains. However, the proposed rule by its terms extends Federal CWA requirements to ephemeral drainages, which would include such a field drain, or as we call them, water furrows. If these small drains become regulated, producers will not be able to apply crop protection products, fertilizer, or other needed inputs to raise a crop within a hundred feet or more of each of these drains.

I have served on my counties Natural Resources Conservation Service (NRCS) county committee for 25 years and appreciate the importance of USDA's voluntary conservation programs. These programs are incentivizing producers to implement conservation practices that reduce erosion and nutrient loss from cropland. On my farm, we have utilized the Environmental Quality Incentives Program as well as the Conservation Stewardship Program. Many farms have worked with the NRCS to implement land-leveling practices. Water quality data clearly shows these land-leveling practices significantly reduce non-point source pollutants. Yet, under this proposed rule, these practices will require permits, which will require mitigation, which will make these voluntary conservation measures too costly to implement, even with financial assistance.

These are just some of the examples of how disruptive the proposed rule would be to our members' livelihoods. The stakes could not be higher. The regulation of

low areas on farmlands and pastures as jurisdictional "waters" means that *any* activity on those lands that moves dirt or applies any product is subject to regulation. Everyday farming activities such as plowing, planting, disking, fertilizing, insect and disease control, and fence building in or near ephemeral drainages, ditches, or low spots could be a violation of the CWA, triggering civil penalties of up to $37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained. The tens of thousands of dollars of additional costs for Federal permitting of ordinary farming activities, however, is beyond the means of most farmers and ranchers—the vast majority of whom are family-owned small businesses. Even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a Federal permit to plow, plant, fertilize, or protect their crops.

The Agencies have downplayed the significant impact this regulatory expansion will have on the business of farming and ranching. Telling farmers and ranchers to just "get a permit" is unhelpful when getting a permit means far more than filling out a form and paying a permit fee. The costs associated with obtaining a permit often include fees of both lawyers and technical consultants whose expertise is necessary to ensure an accurate application and to develop the plans that must be submitted with the application. There are also ongoing compliance costs related to management practices, record-keeping, reporting and monitoring.

For section 404 permits in particular, the costs can be extremely burdensome. There are two types of permits available depending on the farming activity and the amount of "navigable waters" that will be impacted. If a farming activity will impact less than ½ an acre of "navigable waters" (or less than 300 linear feet), a farmer can seek a Nationwide Permit (NWP), such as NWP 40 for certain agricultural activities, under CWA section 404(e). Studies show that the average cost to secure an NWP is almost $36,000. With more ephemeral streams and ditches deemed "navigable waters," fewer activities will qualify for NWPs and more farmers will need to seek individual section 404 permits, which have a staggering average cost of $337,577.

Some of the most substantial costs associated with section 404 permitting include "mitigation" requirements and other "conditions" attached to any permit that a farmer must accept to be able to conduct the permitted activity. Moreover, obtaining these permits takes time (assuming a permit is granted at all). While an NWP may take "only" 10 months to obtain, an individual permit often takes more than 2 years. In the meantime, permit applicants cannot move forward with their operations. Clearly, such timelines are not consistent or feasible relative to the production of annual crops that have an average growing season of 5 to 8 months.

Few studies have quantified the costs of seeking and complying with section 402 permits, perhaps because of the great variability among industries and the wide range of costs associated with individual permits *versus* "general" permits. For pesticide applications, a section 402 "general" permit may or may not be available, as many pesticide National Pollutant Discharge Elimination System NPDES general permits have been drafted for specific types of applications that would not include row crop production. Several EPA public statements during the comment period have indicated that general permits are available for pesticide use, but EPA has provided no specific information on how many states actually offer general permit coverage for pesticide applications to row crops. Meanwhile, EPA has been completely silent on the absence of any general permits (to our knowledge) for fertilizer application (outside the CAFO context).

Unless and until EPA and the states that administer the section 402 permitting program issue general permits for fertilizing crops, farmers may have no choice but to pursue individual permits simply to fertilize their crops grown within or near the countless newly jurisdictional low spots on farm fields. Whether general or individual permits are involved, perhaps the largest likely cost of NPDES permitting requirements for essential farming practices is the cost of not being allowed to apply products or nutrients in or around newly jurisdictional features that are ubiquitous across our nation's most productive farming regions. This cost is in the form of diminished productivity, reduced efficiency and increased risk of disease—not to mention the risk of enforcement (imagine a farmer being forced to prove in court that he turned the spray nozzle off before passing over a dry ephemeral drainage). EPA's failure to even consider implications such as these further undermines the credibility of its already fatally flawed economic impact analysis of the proposed rule.

The Agencies have done a tremendous amount of outreach to the agricultural community. Unfortunately this was only after the release of the proposed rule, and while appreciated, it would have been much more beneficial for that outreach to have occurred prior to the release of the rule. The agriculture community has hosted the Region 4 EPA Administrator as well as other EPA officials on operations in Mississippi to help show the "on the ground" impacts of their proposed rule. During this

process, the Agencies have made promises to make significant changes to the rule, and this is a positive step. My concern is that once these significant changes are made, in all likelihood, the public will not have an opportunity to review and offer comments to the Agencies. Given the amount of public interest in this rule, we strongly encourage the Agencies to release the revised rule again for public comment. The CWA involves an extremely complex set of rules and regulations, and it is important for rural America to have ample input into any final rule that the Agencies promulgate.

It is clear that this rule will have a significant impact on rural America and production agriculture. I thank this Committee for its diligence in defending agriculture and appreciate the opportunity to testify on this important issue.

The CHAIRMAN. Thank you, Mr. Taylor. Your testimony is appreciated.

Mr. Foglesong, whenever you are ready, go ahead and proceed with your testimony for 5 minutes.

STATEMENT OF STEVE FOGLESONG, LIVESTOCK PRODUCER, ASTORIA, IL

Mr. FOGLESONG. Let me fix the audio. I don't have near the speaking voice of Mr. Taylor, so I want to be heard here.

Good afternoon. I am Steve Foglesong. I am a cattle and hog farmer from west central Illinois, and we raise corn and soybeans up there, and we have a ranch down in southwest Georgia as well. And I am a member of the National Cattlemen's Beef Association. This afternoon, I will be speaking on behalf of livestock producers, dairy guys, and poultry producers across the United States. It is a great opportunity. We certainly thank you for giving us the chance to do that.

Animal agriculture producers pride themselves on being good stewards to this country's resources. We maintain lots of open spaces, rangelands provide wildlife habitat, and all the while we are doing this, we are working on sustainably producing food for the world. But in order to provide these important functions, we need to be able to operate without excessive Federal burdens. This one we are talking about here today is excessive.

As a livestock producer, I can tell you that after reading the proposed rule, it has the potential to impact everything that I do on my place. And every tributary, stream, dry pond, you name it and we have a lots of them, are going to be an issue. And what is worse, the ambiguity that is proposed in this rule. And then these folks and everybody today has done a great job of explaining just the problems that we have there. And what I want to do is spend a few minutes, plus you guys are being bored, and if the Clerk could fix that, we are going to put up some pictures here. We are going to do a little pictorial here of my place.*

This picture here that you are seeing, this is my house. You can see my house tucked away there. And tonight when you go on Google and you dial down a little bit closer down there, you are going to see my wife and one my grandkids, and they are swimming right there next to that dock there that goes out. There is a little blue dot and a little white dot. I did this. This picture was taken in 2012. The worst drought in my entire life. By far a bad deal for us, but it is going to be a great day today because all the

*__Editor's note:__ The images displayed during the witnesses' statement are retained in Committee file.

vegetation is gone off of our ranch, and we are going to be able to see every depression that is out there pretty clearly. There is a little blue and white dot, and when you see those, you are going to wonder what that is all about. Well, we are real sensitive around our place to skin cancer, and we wear protective clothing. That is why I could pick them out and I knew where they were at. So that is kind of where we live. This is all old coal strip mines is what this is. Everything out here has been reclaimed. Man turned it all upside down, and we spent the—all of my lifetime putting it back together and turning it into a ranch where we can produce cattle.

When we go to this next picture, this is 2012. This looks like a moonscape. This is a pasture just north of the house up there. You can see we have been feeding the cows. It is about 8 o'clock in the morning here, and you can see that little line of ants over there that look like they are going back and forth—that is cows, but we are a long way up. The question here that this picture brings up, you see that dry lake right there. That dry lakebed. There is no water left in it. All of those little rills that run down to that, are those WOTUS? Is that a *Waters of the United States?* That is the question I have to answer.

Here is another little picture. Same kind of deal. Little pond out there. Now, Mr. Lucas, in your country, this is called a tank, and farmers and ranchers go out and they build tanks and they build them so that the cattle have water. And in the summertime, those cattle will go out and hang out in that tank, and it is really nice on a morning that it is warm enough that you can go swimming at 8 o'clock in the morning. It is pretty doggone hot. Now, the question I ask you here, is this a *Waters of the United States?*

Here is a picture of our confinement barn. Just the end of it right there. We run about 4,500 head of cattle in there. That is a root structure with slats underneath of it. All of the waste in that—those cattle produce goes in that tank, and we use every last bit of it to improve the soil conditions and the fertility on this ranch. We do a darn good job of maintaining that. There is no run-off coming out of that building. And and here is a little lake that is only about a ¼ of a mile away from that building right there, and all of that land that runs around there drains into it. Our concern is, do we have to do something about it, is this *Waters of the United States?*

Here is the other end of the barn. It is ¼ of a mile long. You can see it from a jetliner if you leave Peoria and fly to Dallas, so it is a pretty good size shed. Same deal; we have to have a few pens around there where we gather up cattle. When they come in, they have to hang out someplace, and this is where they wind up. But everything drains someplace.

Now, this is another question here. Those buildings there happen to be hog buildings. They could just as easily be chicken barns, but those are hog buildings there. And you will notice, and here is the question on this one here, see that parking lot? There are about 25 employees that park their cars right there, and all the dust that comes out of the fans on those buildings lands here. Lois Alt and West Virginia fought a great battle with the EPA a year or so ago over this very question, because when it rains, that water flows somewhere. You all understand how that goes, and it all goes

downhill. Well, it goes east here, and it runs through those rills and it winds up in that lake. That lake is where we water those hogs. Does the EPA have jurisdiction over that lake?

And this is the last picture I want to show you right here. If you look down there to the far right-hand corner on there, that little circle, that is Illinois River. Now, boats float there, we ship corn up and down that river on barges. That is navigable. That is a *Water of the United States,* and it always has been. Nobody owns that. That is a water that were considered—at the opposite end of that deal right there, you are going to see that little circle. That is the middle of my ranch. And you see those little lakes that I have been showing you, those little blue lines that are on there, and that is Otter Creek, all the little fingers that go around there that flow all the way up, and they go down into that deal. Now, here is the deal. I pay for that. I don't see the EPA or the Corps on any mortgage that I have that says they have jurisdiction over that, and I sure as heck don't see them come payday. So it causes me quite a bit of concern when they want to have control over that. And it flows all the way to the Illinois River, 11½ miles away. Where does that thing end? Where does their jurisdiction start and stop? That is the question that we have to ask.

I certainly thank you for the opportunity, and will entertain any questions that you might have.

[The prepared statement of Mr. Foglesong follows:]

PREPARED STATEMENT OF STEVE FOGLESONG, LIVESTOCK PRODUCER, ASTORIA, IL

Good morning, my name is Steve Foglesong. I raise and feed cattle and hogs and grow corn, soybeans, and hay in Astoria, Illinois and I am a member of the National Cattlemen's Beef Association. I am testifying before you today representing livestock, dairy and poultry producers across the United States. Thank you Chairman Thompson and Ranking Member Lujan Grisham for allowing me to testify today on the impacts of the Environmental Protection Agency and the Army Corps of Engineers' proposed rule on the definition of *Waters of the United States.*

First and foremost, I want to thank you for your interest in this issue and for including language in the omnibus package that led to the withdrawal of EPA's WOTUS Interpretive Rule. I am thankful that Congress continues to be engaged on this because EPA intends to finalize the underlying rule, the WOTUS rule, at some point this year.

Animal agriculture producers pride themselves on being good stewards of our country's natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and feed the world. But to provide all these important functions, we must be able to operate without excessive Federal burdens, like the one we are discussing today. I am extremely concerned about the devastating impact this proposed rule could have on me and other ranchers and farmers. As a livestock producer, I can tell you that after reading the proposed rule it has the potential to impact every aspect of my operation and others like it by regulating potentially every tributary, stream, pond, and dry streambed on my land. What's worse is the ambiguity in the proposed rule that makes it difficult, if not impossible, to determine ***just how much*** my farm will be affected. This ambiguity over key definitions will result in disparate interpretation by bureaucrats in different regions of the country and place all landowners in a position of uncertainty and inequity. Because of this, I ask that the EPA and the Army Corps of Engineers withdraw the proposed rule and sit down with farmers and ranchers to discuss our concerns and viable solutions, ***before*** any additional action.

Let's be clear—everyone wants clean water. Farmers and ranchers rely on clean water to be successful in businesses. But, expanding the Federal regulatory reach of the EPA and Army Corps does ***not*** equal clean water. After reading the proposed rule, I can say that only one thing ***is*** clear, the proposed definitions are ambiguous. If the agencies' goal was actually to provide clarity they have missed the mark completely. Despite the agencies' assertion that a tributary is clearly defined by a bed, bank, and ordinary high water mark, confusion and ambiguity is introduced when

the rule explains "[a] water that otherwise qualifies as a tributary under the proposed definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." How far will I have to look "upstream" to ensure I am not liable for applying fertilizer or pesticide into an area that may lack a bed and a bank and an ordinary high water mark yet is still considered a jurisdictional water?

Although the proposed rule provides exemptions for ditches, they are ambiguous and are of little or no value to agricultural operations. For example, the proposed rule excludes "ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow." Unfortunately, the term, "uplands" was not explained or clarified in the proposed rule.

Similarly, the proposed rule also excludes "ditches that do not contribute flow either directly or through another water" to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow (even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion provides no benefit to agricultural operations.

The proposal would also make everything within a floodplain and a riparian area a Federal water by considering them "adjacent waters." While this alone is concerning, the extent of this authority is equally ambiguous. The proposed rule provides no clarification on how far a riparian area extends away from the water body nor does it delineate the flood frequency that would determine jurisdictional boundaries. Using "best professional judgment" to answer this on a case-by-case basis, as is suggested in the proposed rule, provides no meaningful guidance to agricultural operations and once again highlights the proposed rule's lack of clarity.

We are currently feeding 4,000 head of cattle in our slatted floor confinement barn. I also graze cattle on my land. My partners and I have 18,000 sows in confinement barns, and I grow corn and soybeans. My land is reclaimed strip mine ground. We used cattle and hogs and the manure they produce to get this land back into a state of production. I have seasonal streams running through my pastures and fields, as well as many ponds, lakes, and ditches. We have literally 500–600 acres of water on our land. It appears to me that many of these features could now become Federal waters under this proposed rule. If they ***are*** '*waters of the U.S.*' I will need a 404 or 402 permit to conduct everyday activities near those waters. Permits that will be costly and time-consuming.

Farmers, ranchers and poultry producers often rely on working and shaping the land to make it productive. This includes installing practices to control and utilize stormwater for the benefit of growing crops and forage and also sustaining and protecting agricultural livestock. Regardless of the agencies' claims to the contrary, the new jurisdictional framework crafted from the proposed rule would require me to obtain Federal permits to plow certain fields, apply fertilizer, graze cattle in the pasture, build a fence, or operate a poultry and egg production operation.

Not only could I be required to obtain a 404 permit for grazing my cows in the pasture or a 402 permit for my feeder cattle and sows, but by making it a Federal water there are now considerations under the National Environmental Policy Act and the Endangered Species Act due to the Federal decision-making in granting or denying a permit. There is also the citizen suit provision under section 505 of the Clean Water Act that would expose my operation and my family to frivolous legal action and unnecessary expense. For the price of a postage stamp someone who disagrees with eating red meat could throw me into court where I will have to spend time and money proving that I am not violating the Clean Water Act. This is not what anyone had in mind when Congress passed the Clean Water Act forty-three years ago.

I'm fearful the proposed rule, if finalized without substantial change, will result in cattle grazing becoming a discharge activity subject to legal liability under the Clean Water Act. To my knowledge, the Federal Government has not considered cattle, raised on pastures, to be a point source or require dredge and fill permits to operate. Unfortunately, the proposed rule seems to be the mechanism that will initiate these changes. This did not have to be the result; all the agencies had to do was engage agriculture early on in the process, incorporate our suggestions and we would be much farther along in crafting a rule that actually would clarify the scope of Clean Water Act jurisdiction.

We are particularly concerned with the lack of outreach with the small business community, contrary to the Regulatory Flexibility Act. As a family-owned business and knowing the detrimental impact this regulation will have on my operation, it

is appalling the agencies could assert that it will not have a "significant economic impact on a substantial number of small entities." It is clear to me that the rule's primary impact will be on small landowners across the country. The agencies should have conducted a robust and thorough analysis of the impact, but it is clear from the certification that they have not completed this important step in developing the regulation. There was also zero outreach to us in the agriculture community before the rule was proposed. Despite what the EPA and Army Corps are saying, they did not have a meaningful dialogue with the small business community as a whole. Even when cattle producers asked the head of EPA's Office of Water a year ago about the proposal, all we were told was to "wait and see what the proposal says." Well we were forced to wait instead of having input and what we got was a proposal that doesn't work for small businesses, doesn't work for animal agriculture, and doesn't work for the environment. Farmers respond to carrots not the stick. If you give us the tools to achieve improved water quality, we will be receptive to that and work together.

We want to continue to do our part for the environment, but this ambiguous and expansive proposed rule does not help us achieve that. This is why the animal agriculture community has joined with land owners across the country asking the EPA and Army Corps to withdraw the current WOTUS Proposed Rule. Then EPA and Army Corp must have serious and meaningful dialogue with the agricultural community to find the necessary solution that will provide the clarity and certainty we require. We look forward to working with the Agriculture Committee to ensure that we have the ability to do what we do best—produce the world's safest, most nutritious, abundant and affordable protein while giving consumers the choice they deserve. Together we can sustain our country's excellence and prosperity, ensuring the viability of our way of life for future generations. I appreciate the opportunity to visit with you today. Thank you for your time.

The CHAIRMAN. Okay. Well, I thank all the witnesses for your testimony. And we are going to proceed with questioning.

And I am going to yield my time to the Chairman Emeritus of the full Agriculture Committee, Mr. Lucas.

Mr. LUCAS. Well, I am always proud to know, Mr. Chairman, when there is acknowledgement I am still alive. There is something to be said for that. And a wonderful Ranking Member too, and our friends on the panel there who went through all the joys of the farm bill process with us, and tried to make sure that the resources for crop insurance and EQIP and all those things were there. Now, quite clearly, as you all make the case, along comes issues that essentially are beyond our control. Depending on what the EPA determines on *Waters of the U.S.*, and a myriad of other rulings, it literally could turn us inside out. So thank you for being here today to create a permanent record for the Subcommittee to use and the full Committee to use as we work with the folks who care about sound science to try and make sure that we can continue to farm and ranch and do the things we love, which is feed not only the people of this country, but for that matter, the entire world.

Again, Mr. Chairman, I thank you for the chance to have a word. And I don't know that I have a particular question for our witnesses other than they presented very factual, high-quality information for the record, and that is a part of it. You help us make the case.

I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

I now recognize the Ranking Member for 5 minutes.

Ms. LUJAN GRISHAM. Thank you, Mr. Chairman. And I too want to recognize the panel and appreciate your efforts today. I agree that we have heard a great deal of testimony, and had the opportunity to review your written testimony that shows that there is a great deal of uncertainty. The point that we were able to clarify,

one point, in the earlier panel is the *status quo,* we have significant issues in terms of clarity about who does what, and in the proposed rule by EPA we find ourselves in much the same situation. I am reminded, quickly before I go to two questions to the panel, Mr. Chairman, recently I was in Florida and I had the chance to visit a Native American tribe, the Miccosukee Tribe, and they used to farm in the Everglades, and are no longer able to do that or enjoy the—and not just enjoy, for their livelihood and diet, they can't hunt or fish on their reservation anymore because of the phosphorus and other pollutants largely due to agricultural practices. We don't want to stop those agricultural practices, so we have to figure out what it is that we are going to do. And so I really appreciate that we look at this issue carefully, and agree that we have a long way to go.

Ms. Steen, in your testimony and your efforts, and I am going to quote you, "to ditch the rule or start all over," I want to say that, according to the EPA, that the agency has received letters and comments from over 100 organizations including the American Farm Bureau Federation requesting clarification of the WOTUS rulemaking, and part of it is because the *status quo* is generating too much uncertainty. So sort of on the other side of your comments. Does the Farm Bureau still believe that the current situation, without regard to the new proposed rule, is not adequate to deal with clean water?

Ms. STEEN. Yes, ma'am. We do believe that there is a need for a rule. We do not find the current situation to be acceptable, however, we think that this proposed rule would be dramatically worse than the current situation, and we need a different rule, not this rule.

Ms. LUJAN GRISHAM. I appreciate that. And I would love it as a follow-up, and I want to make sure I have enough time for my second question, to restate for the Committee, and for the Chairman and myself, if you can, what you are proposing as best practice so that we are, in fact, doing more for clean water and management, and the complexities of these issues. That would be helpful to the Committee, even though we don't have jurisdiction over EPA, we want to do best practices and engage with USDA. So that would be great, because basically, we agree, and you heard that resoundingly in the Committee, that the stakeholder involvement on this proposed rule is inadequate.

With that, I am going to use the balance of my time for another question. I appreciate your testimony, Mr. Gledhill, thank you very much for your comments. I actually want to get right at some of the permitting issues. I really want to get a handle on how we come up with the cost of permitting, because I agree that that uncertainty is problematic and the economic consequences are significant, but we really do need to know what is real and what is not real. Can you cite an EPA number of that $57,000 for cost of a permit? I can't find that, or the tangible evidence that that is the cost.

Mr. GLEDHILL. Yes. That number is in EPA's economic analysis.

Ms. LUJAN GRISHAM. All right. I am having trouble with that. Is it for a section 402 permit, or is it for a general or individual permit?

Mr. GLEDHILL. It would be for an individual permit.

Ms. LUJAN GRISHAM. Okay. And then can you give me what all goes into the cost of the $57,000, and associated costs?

Mr. GLEDHILL. Well, we don't have EPA's detailed information to know exactly what goes into it, but the typical parts of a permit would be to show that you—what your discharge is, your monitoring requirements, you have to propose it, there is an administrative cost to file it. So there are several different components using consulting as well as monitoring that would go into that cost.

Ms. LUJAN GRISHAM. Yes, I would like to submit that for the Chairman and, again, a request for you. I appreciate your being here.

Mr. GLEDHILL. Sure.

Ms. LUJAN GRISHAM. I think it is important both from the EPA and from our expert witnesses, we really need to understand the genesis of that cost, given particularly that this panel has identified the cost to individuals and private landholders could be considerable, we ought to know exactly what that is, how that was identified and arranged, and have that as part of our record, Mr. Chairman.

With that, I yield back the balance of my time.

The CHAIRMAN. Without objection.

The CHAIRMAN. The gentleman from Ohio, Mr. Gibbs, is not a Member of the Subcommittee, but has joined us today. Pursuant to Committee Rule XI(e), I have consulted with the Ranking Member and we are pleased to welcome him to join in the questioning of the witnesses.

I now recognize Mr. Gibbs for 5 minutes.

Mr. GIBBS. Thank you, Mr. Chairman. And thank you for the panel and thank you to our livestock farmers and our cotton farmers, and all that you do to feed the American people, and clothe the American people.

Couple of things I want to start with. First of all, Mr. Foglesong, if I said your name right.

Mr. FOGLESONG. You did pretty good. That is good.

Mr. GIBBS. You asked quite a few questions, and I think I can answer some of those questions for you. This will be a little bit reversed.

First of all, the EPA did a study, more than a year, to figure out that water flows downhill. So our taxpayer dollars were, I am sure, used wisely. We had hearings in my committee, I chair the committee that does have jurisdiction on this issue, and we had joint committee with the Senate a few weeks ago, and what we heard from Administrator McCarthy and Secretary Darcy of the Army Corps that they are going to look at all this on a case-by-case basis, be very subjective, because that is how they have to do that. So they are going to really open up the door for a lot of bureaucrats to come out to your farm and tell you that is *Waters of the United States*.

And to answer the Ranking Member's question. I have a picture here. Mr. Chairman, this is a farm in Tennessee. It is a no-till field. You can see the corn residue. You see the wheat—I don't know how well you can see this, but it kind of looks like a washout to me a little bit. Probably should be maybe a grass waterway there a little bit. Well, apparently—not apparently—it happened

that the Army Corps in the Nashville district declared that *Waters of the United States*. Now, I held this picture up in front of Mr. McCarthy and Darcy, and they said, "Well, that is why they need the rule because that wouldn't have happened." I would argue that the Nashville district of the Army Corps has already implemented the rule. And in this case, the Ranking Member was asking about cost to get the section 404 permits. $318,000, by the time they did the studies and the consultants in this case, in this instance.

And then what also happens, the land around it, joining property owners because the connectivity rule, they are automatically declared *Waters of the United States*. And the panelists, you are absolutely right, that field now would have to get a section 402 permit from the EPA to apply herbicides. So the cost, it is just really, really outrageous.

And you mentioned, Mr. Gledhill, about stifling innovation and unknown, and the citizen lawsuits, and I would argue, Mr. Chairman, that this rule, and it is probably going to get implemented because the EPA is moving fast and furious in the next 30 to 60 days, and I asked the question of Administrator McCarthy in our hearing, a lot of questions came up, and I said, they said they would address that in the final rule, and I said, "Well, are you going to issue a supplemental so Members of Congress and the American people can see it?", and they said, "No, that is not necessary, we are moving forward." And I would argue that this takes us backwards, because a one-size-fits-all policy out of Washington, D.C., when it comes to water and land, is best regulated at the state and local level and not a one-size-fits-all policy, because when you think about bodies of water, and lakes and streams around the country, there are a lot of different things happening. The flow, the critters in those bodies of water, the sunshine, the pH, and to have just this power grab—and by the way—the Ranking Member talked about comments. Thirty-four states out of the 50 states are opposed to the rule, and 22 of those states urge that it be withdrawn completely. Thirty-four states. I believe it takes 36 states to ratify an amendment of the Constitution, so you can see the point. And we all know that there are a whole bunch of organizations, both state and local, and private sector entities and the Farm Bureau, that are opposed to the rule. We need to stop this, and I don't know if we are going to be able to do that. We have to get support in Congress because they are moving ahead.

And I want to thank you for coming today to share real stories of what you are—your challenges you have every day. And your pictures were excellent. I am a farmer myself, so I can share some of those thoughts with you. But for them to put this rule out, circumvent Congress, is really outrageous, and it makes us go backwards to protect the environment because, if you remember how the Clean Water Act in 1972 when it was passed, it was passed to be a Federal cooperative where the states would implement and enforce the Clean Water Act, and the feds would have guidance, and that is why every 3 years the states have to submit a plan of action to the U.S. EPA. And so this is nothing but a power grab, takes power away from the states, it erodes personal property rights, and it is going to add to cost both the state and local governments, and the farmers and developers and so on.

I guess I don't really have a question, I was just answering some of your questions. We need to stay on this. And I want to thank you for coming and trying to bring more light to this issue because—another point that needs to be made, Mr. Chairman, as a farmer, and the farmers are here today, they drink that water first and they live on that land, and farmers are excellent stewards of the land, and we all want to make the water as clean as possible and for the next generations to come. And so just again, thank you, and I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

I take the liberty of taking my round of questions at this point.

I am going to start with Ms. Steen. Historically, we have looked to the word *navigable* in the Clean Water Act, and a Commerce Clause connection in answering the question of what is under Federal jurisdiction as navigable, and how does this proposal fit with those concepts.

Ms. STEEN. Well, it goes completely beyond and would have nothing to do with the Commerce Clause or commercial use of waters. And, in fact, what it really codifies in our view is something even beyond the substantial—or rather—any hydrologic connection test that the Supreme Court rejected in the *Rapanos* decision. At that point in time, EPA had already been told that the Migratory Bird Rule, which was purportedly based on the Commerce Clause authority, was unlawful. They went back, they developed a theory for saying that waters or so-called waters with any hydrologic connection to navigable waters would be jurisdictional. The Supreme Court rejected that in *Rapanos.* And this rule now would codify a view that anything with any not insignificant, not speculative connection, no matter how remote, no matter if it is a hydrologic connection or a biological connection of animals moving back and forth within a region, and we all know that resources are connected, we all know that waters are—there is a hydrologic cycle. Animals move around. I mean the breadth of the connection that EPA is saying here and the Corps can justify sweeping areas that don't even look like water, that don't even look like water, into the term *navigable waters* is astounding.

And if I could on that point just cite to one particularly striking piece of the preamble. The term *water* isn't defined in the rule, and it is because a lot of the things being regulated as waters under this rule don't look like water. They are land. But they say in a footnote that the agencies use the term *water* and *waters* in categorical reference to streams, rivers, ditches, wetlands, ponds, lakes, blah, blah, and other types of natural or manmade aquatic systems. And then they say, well, puddles won't be regulated. Well, how big does it have to be to be a pond? We already know ephemeral waters, waters that exist only when it rains, can be regulated because that is what they call an ephemeral stream. There is literally no limit to what could be viewed as a jurisdictional water under this rule.

The CHAIRMAN. In your opinion, would you agree that given the realities—the definition of the *Clean Water Act,* which was fairly well articulated back in 1972, 1973, that what both the EPA and the Corps of Engineers are trying to do is really to exercise legisla-

tive functions. They are trying to, through rulemaking, trying to circumvent the Legislative Branch and create new law?

Ms. STEEN. Regardless of intent, I think that is the effect of what they are proposing.

The CHAIRMAN. No, that was—again——

Ms. STEEN. Absolutely.

The CHAIRMAN. What is most important is—yes.

Ms. STEEN. Absolutely. The effect of what they are——

The CHAIRMAN. Consequence.

Ms. STEEN. What they are proposing here would be to dramatically expand worlds beyond what Congress ever had in mind in 1972 when it used the term *navigable water*——

The CHAIRMAN. Yes.

Ms. STEEN.—and beyond what the Supreme Court has said is within their authority. They have tried to shoehorn, or they have shoehorned this rule into the term *significant nexus* that was used by Justice Kennedy, but they have made it limitless. They have made it absolutely limitless.

The CHAIRMAN. Yes, that is our concerns——

Ms. STEEN. Yes, sir. And——

The CHAIRMAN.—here. Mr. Gledhill, it seems that the Federal Government has conflicting missions. The Agriculture Department promotes food production, yet the EPA and the Corps are doing everything they can to stifle such production through increased regulation. If the EPA and the Corps succeed with all these regulations, in your opinion, what will be the impact on the rural economy and, quite frankly, our nation's food supply for all Americans?

Mr. GLEDHILL. Well, thank you, Chairman. One way I look at—try to do the economic impact, if I look at Mr. Taylor and Mr. Foglesong, there are 70 million farms in the United States, small, medium-sized farms. If each one of them spends $1½ to try to understand this rulemaking, we are already at $100 million of effect, which should—which triggers under the statute and Executive Order's rigorous review—the highest level of rigorous review by the Executive Branch. And we do have conflicting missions in the Federal agencies between USDA, FDA, EPA, all these agencies, and OMB and the White House, and the Executive Office of the President is where these issues are supposed to be resolved, where people estimate the impact. So policy officials and elected officials can understand and make the trade-offs, because it is not between environmental protection or rural development, it is having the right balance of both that allows us to achieve both, and we can only do that if we have the information, and if we make these decisions in a public, transparent way, in which many stakeholders are collaborative and collaborating. And we are concerned from the impact on USDA programs that that collaboration is not happening even within the Administration, much less, as you have heard from all the stakeholders here on these two panels, with the broader stakeholders in our economy, especially our rural economy.

So I don't think we know the impact. My concern is the agencies are not doing their role to understand the budget and mission impact, and conveying that to elected officials in the Administration, and more importantly to the public as a whole.

The CHAIRMAN. Thank you, sir.

Mr. Biggica, our rural electric co-ops, they are just well-known for affordable and reliable electricity. And could you elaborate on the specific challenges facing utilities, such as rural electric co-ops, with an expansion of the WOTUS rule, and where there is, obviously, an obligation to keep the lights on?

Mr. BIGGICA. That is correct, Congressman. The challenges that we will face——

The CHAIRMAN. Russ, you want to check your microphone there.

Mr. BIGGICA. The challenges that we will face if this proposed rule goes through are ones of enormous cost. As I mentioned in my testimony, with the broad definitions of *tributaries* and *adjacent waters,* that is what our environment is. We have power lines that have to be extended, we have transmission lines that have to be extended. In Pennsylvania, we are basically talking about distribution lines, but with our 900 cooperatives across the country in 46 states, we are talking about transmission lines, bringing some of that clean energy back to our members, and we are going to need the ability for quick and honest permitting that is affordable for us to transmit that power.

We have a study that says if we go beyond what is that general permit that I have alluded to in my testimony, that the cost of individual permitting, and it is documented in the written testimony, is ten times higher than a general permit. So the cost of—that we are experiencing right now will more than five times the amount. We can't afford to do that, especially the people that we represent. We have a higher poverty rate than most areas of the country serviced by investor-owned utilities. And as I said before, the striking difference between us and other power companies that are owned by stockholders is that we have a population density of about seven members per mile. They, on average, nationally it is 42 members per mile. We can't afford any cost input, especially now as we have gotten through this economic climate, as we all know in rural Pennsylvania and rural United States, rural areas are the first one in when hit with economic downturn, and we are the last ones out. So any additional cost to maintain and to strengthen and to expand out rural infrastructure, with this rule being in effect, would only cost us more money.

The CHAIRMAN. Thank you, sir.

Mr. Taylor and Mr. Foglesong, on a related issue, part of the testimony I heard about is in terms of if this would go into effect, those who would have responsibility to be the regulators, the police, so to speak—with the lack of clarity in this rule, I have a concern that we would see a wide variance of interpretation depending on what region, where you lived. In Pennsylvania I ran into this with—we are blessed—God has blessed us with great natural gas, and it has really been good for my Congressional district and good for the Commonwealth, and yet I can tell you because of the size of the state, we are in a number of different Corps of Engineer districts. Depending on what office you are in, supposedly these regulations are the same, but there is wide variance in terms of how they are interpreted. And so my question for both of you is: as the EPA and the Corps continue to claim that normal farming practices are and will continue to be exempt, yet there has been considerable concern about how this will be interpreted. Can each of you

expand on your concerns regarding this? Let us start with Mr. Taylor.

Mr. TAYLOR. Well, of course, that is one of my main concerns, and it is not just the regulators that may come in, and you may check with one and they may give you one opinion, and one would give you another, but also citizens bringing suit would concern me greatly because the law is so broad that it doesn't necessarily define what those waters are but it is broad enough that it could be taken to court. I might even win, but in the meantime it has cost me, I don't know how many tens of thousands of dollars to defend myself, and it is a real concern. I am not sure—did I——

Mr. FOGLESONG. Unfortunately, I am afraid just about every farmer is going to wind up with some practical experience, and I am no different than that. We have experienced that at home where the Illinois Department—or the Illinois EPA is the cop on this deal. And I have land in at least two different districts, with two different guys that interpret the rules dramatically differently. The one guy, if there is an issue that we need to deal with, comes out, we sort it out, we get it fixed and we go on. The other guy, you wind up sitting with the Attorney General of the State of Illinois just like that, and you spend a boatload of money trying to fix and defend your deal. And then it becomes a matter of principle, and you know what principles are. Principles means you have to see how deep your pockets are. But unfortunately, in my situation, I have children and I have grandchildren that I have to set an example for, and I will be doggone if we are going to lose this fight, so we are spending money hand over fist. And this just makes it that much worse.

I have had the opportunity to sit with the U.S. EPA on a couple of occasions where we were talking about the definitions. The last time I was here in D.C. we sat down with EPA. I had three attorneys with me, they had seven or eight with them, and we didn't get a damn thing done all day because we argued. And you ask about solutions on what this is. I have a solution for you. You get Sledge and me and a whole bunch of these other shareholders, we get together with some folks over at the EPA, we ban all attorneys from being in the room, because all they want to do is fight, and we can come out of there with a set of recommendations that are actually workable. But until we get to that point, I am not sure that there is a solution or an endgame in this. It is so hard for us to know where we want to be tomorrow and what we should do, and what those rules are going to impact us.

At our place, and most farms around the country, I am out doing stuff. I am not a detail guy, I want to go build something. My wife is the bookkeeper and that is the way you find out. And she has buckets that she puts money into. And when we put $100,000 to defend our right to farm in a bucket for the EPA, that means I don't have $100,000 to go out on this place and build another pond or put in some dry dams or something else, and at the bottom line, no water ends up getting any cleaner because of extra regulations.

If you really want to fix the thing, give me a carrot not a stick, because all the stick does, wants me to go sharpen my sword And when you get to be 60 years old, you know how that is, we are all

pretty crusty and pretty tough to deal with, so that is the issue. But I appreciate the question and the opportunity to answer it.

The CHAIRMAN. Well, thank you.

I am going to take this opportunity to yield any additional time to my colleagues. Mr. Gibbs?

Mr. GIBBS. Yes, thank you. I just want to follow up on the ag exemptions.

For Ms. Steen, we had the interpretative rule and, of course, we got that out in the Cromnibus, but USDA working with the EPA said they had to do the interpretive rule to make it clear for agriculture, but is it correct to say that the interpretive rule was only in effect for farmers out here if they were partnering with NRCS on a program? Is that true?

Ms. STEEN. Yes. Well, it required compliance with NRCS standards in order to qualify for the exemption for the normal farming exemption for those conservation practice. Yes.

Mr. GIBBS. Yes.

Ms. STEEN. Yes.

Mr. GIBBS. So I guess you could extrapolate from that that they need—when the WOTUS rule is in place and they were trying to get—USDA was trying to look out, but your concerns are really legitimate, and I guess you would concur that without the interpretive rule, I think it was kind of a façade, trying to demonstrate that USDA was trying to help, but it really didn't have the impact because you would have to have NRCS sign off. And so if a farmer wanted to go out and build a fence on his own, and not do cost-sharing or do anything with NRCS, he possibly could be forced to get a section 404 permit for dredge and fill, correct?

Ms. STEEN. Yes, sir. We were always pretty mystified by what the interpretive rule was meant to do because it really seemed like a distraction from the real issue about the expansion of——

Mr. GIBBS. Yes.

Ms. STEEN.—*Waters of the U.S.*, and it, in our view, it gave farmers nothing of any real value because it made the NRCS standards regulatory in effect by saying you are only exempt for these practices if you comply with NRCS standards. So you place NRCS in the position of a regulatory authority, essentially, and at the same cast a cloud of doubt over the other farming practices that aren't listed on that interpretive statement, which should be exempt in any event——

Mr. GIBBS. I——

Ms. STEEN.—at least to qualify——

Mr. GIBBS. Mr. Chairman, that is an important point, working with the farmers, it is the carrot approach, as Mr. Foglesong said, and in the President's budget for the EPA he actually cut compliance expenses and increased enforcement expenses. So we are going the wrong way there on that.

And the other point before I just conclude I want to make is there is a misnomer out there that if the water is not being regulated by the U.S. EPA, it is not being regulated under the traditional navigable waters, the waters that aren't traditional navigable—they are being regulated. Me as a farmer, our farmers out here, they can't just go out and haphazardly do things. I mean they would be in trouble. And so the states are doing that regulation.

That water that is non-navigable—traditional non-navigable waters as we would see them are being regulated. And so that is a misconception out there. I wanted to make that point, sir.

Thank you, Mr. Chairman, thank you for having this hearing to bring more light to the impact on agriculture. It is very important.

The CHAIRMAN. The gentleman is welcome.

I am now pleased to yield to the Ranking Member for any additional questions and a closing statement.

Ms. LUJAN GRISHAM. Thank you, Mr. Chairman. And I am just going to make my closing statement, but I am going to include something that one of the panel experts identified.

Mr. Foglesong, there is a very important balance, and starting with the carrot and creating collaboration, and getting folks who are willing to come to the table and have good ideas is really the purpose of this hearing today. We know that there are considerable comments. We don't believe, you heard that from both sides, that is one of the benefits of the Agriculture Committee is that there is a real reasonable sense about how we move forward by all of my colleagues on both the Subcommittee and the full Committee, and we need the EPA and we need others in any Administration to be clear who their stakeholders are. Where we have real problems, and where we have to do real compliance, a carrot is not working, and then we have to have the tools and resources to do that right job, but you start with creating an environment where we can do something about clean water. I really appreciate that from everyone here. I appreciate very much the Chairman for raising the issue, and inviting so many different stakeholders to come here today and share your concerns, reiterate those, and help us identify some possible solutions forward with both EPA and USDA.

Thank you very much, Mr. Chairman.

The CHAIRMAN. You are welcome. Thank you, Ranking Member.

I just want to thank this panel of witnesses, and once again, the first panel of witnesses. I thought the testimony was just outstanding, both oral and your written testimony. I think that it will all be a part of the record that we are going to be able to use as we continue to look at this situation. Granted, the Clean Water Act is not under the jurisdiction of the Agriculture Committee and this Subcommittee, but quite frankly, the implications on rural America and the implications on agriculture, that is clearly within our wheelhouse. That is what we are responsible for. I thought there was great information, great issues raised. Quite frankly, the Clean Water Act was a very good piece of legislation that was written. It was written in a very thoughtful way, but it had limitations that were defined that way purposely when it was enacted. It was written with a section that includes a strong federalism reference where it recognized the primacy of the states in terms of the regulation of water. Clearly navigable waters were meant to be very prescriptive, and stepped over the line. And so I am very pleased that we are having this hearing, and this—as well as the hearings in other Committees such as Transportation and Infrastructure, a Subcommittee that my good friend from Ohio chairs on that committee.

Once again, thank you to everybody. I thought this was very thoughtful, very helpful.

And under the rules of the Committee, the record of today's hearing will remain open for 10 calendar days to receive additional material, and supplementary written responses from the witnesses to any questions posed by a Member.

This Subcommittee on Conservation and Forestry hearing is now adjourned.

[Whereupon, at 5:19 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

SUBMITTED COMMENT LETTERS BY HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA; ON BEHALF OF:

KELLY J. HEFFNER, DEPUTY SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

October 8, 2014

Water Docket,
Environmental Protection Agency,
Washington, D.C.

Re: Proposed Rulemaking: Definition of "*Waters of the United States*" Under the Clean Water Act (79 FR 22188, April 21, 2014)

To Whom It May Concern:

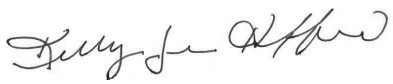
Enclosed please find the Pennsylvania Department of Environmental Protection's (PADEP) comments on the United States Environmental Protection Agency's (EPA) proposed rulemaking: Definition of "*Waters of the United States*" Under the Clean Water Act (79 FR 22188, April 21, 2014).

Pennsylvania respectfully requests EPA and Army Corps of Engineers (ACOE) to withdraw this proposed rulemaking, and to amend the rule after careful consideration of the comments, further collaboration with states, and public hearings. The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs.

PADEP appreciates the opportunity to submit these comments to EPA and reserves the right to submit additional comments after review of the final Scientific Advisory Board report: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Should you have questions or need additional information, please contact me by e-mail at *kheffner@pa.gov* or by telephone at 717.783.4693.

Sincerely,



KELLY J. HEFFNER,
Deputy Secretary.

ATTACHMENT

Commonwealth of Pennsylvania, Department of Environmental Protection

Comments on the U.S. Department of Defense, Department of the Army, Corps of Engineers and U.S. Environmental Protection Agency

*Proposed Rulemaking: Definition of "**Waters of the United States**" Under the Clean Water Act (79 FR 22188, April 21, 2014)*

General Comment

The Commonwealth of Pennsylvania has abundant and precious water resources with approximately 86,000 miles of streams, 404,000 acres of wetlands, 161,445 acres of lakes, 17[2] miles of the Delaware estuary, and 63 miles of Great Lakes shore front.[1] These "waters of the Commonwealth" have long been protected in Pennsylvania by a network of state laws, of which the Pennsylvania Clean Streams Law, passed in 1937, is central[2] Under the Pennsylvania Clean Streams Law ("CSL"), the scope of protected waters is not subject to confusion or debate, but is clear and comprehensive, with the statutory prohibition on pollution or potential pollution to waters[3] of the Commonwealth providing the framework. In contrast to the confusing definition proposed by this rulemaking, the Pennsylvania Clean Streams Law protects all waters of the Commonwealth, which are defined as: "*Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface*

[1] *2012 Pennsylvania Integrated Water Quality Monitoring and Assessment Report.*
[2] Act of June 22, 1937, P.L. 1987, No. 396, as amended.
[3] 35 P.S. §§ 301, 401 and 402.

and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth."[4] The Pennsylvania Clean Streams Law in turn provides authority for at least 56 Chapters in Title 25 of the Pennsylvania Code. These regulations constitute a robust, comprehensive and effective regulatory framework for protection of waters of the Commonwealth.

The Pennsylvania Clean Streams Law is the principal state law authority for the state's permitting programs and the foundation of delegation under section 402 of the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act)[5] by the U.S. Environmental Protection Agency ("EPA") of the National Pollution Discharge Elimination System ("NPDES") program to the Pennsylvania Department of Environmental Protection ("DEP"). The Clean Streams Law also provides authority (together with the Pennsylvania Dam Safety and Encroachments Act ("DSEA")[6]) for the companion state law program under Title 25, Chapter 105 of the Pennsylvania Code relied on by the U.S. Army Corps of Engineers ("ACOE") in their administration of the Pennsylvania State Programmatic General Permit ("SPGP") for Clean Water Act Section 404[7] permitting.

Pennsylvania was therefore frustrated, disappointed and frankly, alarmed, to discover that in formulating this rulemaking, EPA is relying on inadequate and inaccurate information regarding the breadth and scope of state law programs. It is of great concern to Pennsylvania that, despite delegation agreements referencing existing state laws, and the routine interaction with Pennsylvania DEP regarding our obligations and collaboration in administering our NPDES duties alone, EPA would nonetheless rely on and cite in public forums with Pennsylvania DEP officials, the 2013 Environmental Law Institute ("ELI") study titled: *State Constraints—State Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act.* This assessment is named as background information supporting the rulemaking,[8] in articles[9] and in public presentations by EPA officials,[10] although it is not cited in the rulemaking. One of DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is *needed* because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with states.

The ELI study fails entirely to identify codified statutes and regulations that have provided the foundation for Pennsylvania's regulatory programs for decades—in some instances for nearly half a century. Instead, the ELI report only cites a 1996 Executive Order and the wetlands provisions under the PA Dam Safety and Encroachments Act ("DSEA"), and identifies these as loopholes in Pennsylvania. The ELI report does not further analyze the Pennsylvania wetlands permitting program (or compare it to the ACOE 404 permitting program) and more egregiously, fails to reference or acknowledge the regulatory authority under the Pennsylvania Clean Streams Law and the multiple chapters of the Pennsylvania Code which comprise the state's regulatory program. Again, these state laws and regulations form the basis for delegation of the Clean Water Act NPDES program to Pennsylvania, as well as the foundation for the ACOE Pennsylvania SPGP for Clean Water Act Section 404 authorizations.

In 2013 alone, DEP provided approximately 13,066 state law water program authorizations—4,914 of which were under the Clean Streams Law for the delegated NPDES program. These numbers represent the extensive state law oversight in Pennsylvania over projects which affect or have the potential affect waters of the Commonwealth. In order to obtain each one of these authorizations, the permittee is required to undertake its project in compliance with one or more chapters of Title 25 of the Pennsylvania Code. It is particularly noteworthy given the ELI assessment of the Pennsylvania program, that the authorizations and oversight undertaken by PADEP pursuant to the delegated NPDES program constitutes only 38% of the water related permitting in 2013. In other words, 62% of the 2013 water related permitting in Pennsylvania was pursuant to state law authority only.

---

[4] 35 P.S. § 691.1.
[5] 33 U.S.C. § 1342.
[6] 32 P.S. §§ 693.1 *et seq.*
[7] 33 U.S.C. § 1344.
[8] *http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act.*
[9] *http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30.*
[10] June 13, 2014, Berks County, EPA Official Nancy Stoner.

DSEA/CSL—Chapter 105	3,224
CSL/NPDES	4,914
CSL/Sewage Facilities Act [11]/Non-NPDES	4,928

As these statistics demonstrate, Pennsylvania does in fact have a significant and robust regulatory program that reaches beyond the Federal Clean Water Act. Pennsylvania's approach in fact could serve as a model for the cooperative federalism at the heart of the Clean Water Act, which envisions a Federal-state partnership in the oversight and protection of the nation's waters with the Federal law providing a broad general regulatory framework that relies on and supports strong state programs specifically tailored to the unique attributes of each states.

Specific Comments

- **Overcoming structural and authority limitations of the Clean Water Act through the revision of the definition of "*Waters of the United States*" is not appropriate.** Pennsylvania recognizes that the challenges in protecting water resources have evolved since passage of the Clean Water Act in 1972. However, trying to address the problems of 2014 (which are largely wet weather driven and/or are associated with non-point sources) by changing the definition of "*Waters of the United States*" is not appropriate. The proposed definition will expand jurisdiction over stormwater related systems, which is particularly inappropriate after EPA has chosen not to proceed with the national stormwater rulemaking. Further, using this new definition in the existing permitting programs under sections 402 and 404 will render both of these programs more cumbersome and confusing. Expansion of Federal regulatory oversight through a definitional change is not appropriate, hut more significantly, will not be effective. The permitting authorities (state and Federal) will be mired in litigation and disputes related to the proper interpretation of the proposed re-definition of "*Waters of the United States*."
- **The proposed rule is premature in relation to the ongoing discussions with the Scientific Advisory Board (SAB).**

  The determination of applicable science, which provides a baseline for the proposed rule, is not complete or finalized. The proposed rule cites the report and recommendations titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* which is currently being peer reviewed by the SAB. This process of simultaneously evaluating the science during the comment process provides a major obstacle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. It also implies that the scientific basis provided in the draft rule is irrelevant. PADEP recommends that the states and the public be provided with a 60 to 90 day review and comment period, and an opportunity to submit additional comments on the rule given the relationship of the study to this rule.
- **Pennsylvania is not experiencing the purported confusion** that is one of the drivers for the rule. Our state law jurisdiction is common-sense in application and does not generate confusion. As the foundation of our delegated NPDES program and the basis for the ACOE's Pennsylvania State Programmatic General Permit, our state law based programs are effective. Clarification or expansion of Federal CWA jurisdiction is not needed from Pennsylvania's perspective.
- **One size does not fit all.** EPA asserts that protection of the 60 percent of nation's stream miles that flow only seasonally [12] is an important objective of the rule. However, Pennsylvania is not a state for which the majority of stream miles only flow seasonally. Further, to the extent Pennsylvania streams have seasonal flow, they are protected under state law. Administering a detailed and specific but 'one-size-fits-all' definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule may in fact undermine existing state law protections.
- **The rule's focus on section 404 permitting is problematic for section 402 permitting.** It appears that the rule, which grows out of section 404 cases decided by the United States Supreme Court, is focused on providing clarification for purposes of section 404 permitting. This clarity in the section 404 context,

[11] Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1 *et seq.*

[12] Pennsylvania uses the terminology "intermittent stream" and "perennial stream" rather than seasonal. 25 Pa. Code § 102.1

however, will come at the expense of clarity and common sense administration of the section 402 NPDES program.

- **The proposed rule as drafted creates more confusion than it clarifies.** The proposal put forth by EPA and ACOE seems to replace the current "other waters" case-by-case analysis with a new "significant nexus" analysis. However, the "significant nexus" analysis appears to be done on a case-by-case basis. As a result, agencies may be doing little more than exchanging one collection of uncertainties for another. See the following language from the preamble to the proposed rule:
  - "The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and *make the process* of identifying 'waters of the United *States' less complicated and more efficient*." 79 FR 22190 (emphasis added).
  - "The agencies did not adopt the all in or the all-out approach to 'other waters.' Based on the information currently available in the scientific literature, applicable case law, and the agencies' policy judgment about how best to provide clarity and certainty to the public regarding the jurisdictional status of 'other waters' *the agencies today propose the case-specific significant nexus analysis* presented in this rule and explained in the preamble." 79 FR 22198 (emphasis added).
- **EPA staff assurances and presentations suggest that despite the new rule, the implementation of the section 402 and 404 programs in Pennsylvania will not change. This does not provide sufficient certainty to Pennsylvania.** Because the rule as drafted can be interpreted in ways that could significantly impact the administration of these programs, the language of the rule itself must be clarified in a manner that provides assurance to the public, the regulated community and to states such as Pennsylvania with robust programs and bountiful water resources.
- **The "significant nexus" approach to determining jurisdiction in the proposed rule is impractical.** The proposed procedures provided in the preamble for documenting whether there is a "significant nexus" with individual wetlands such that they should be treated as "*Waters of the United States*," are extremely complex and will be very time consuming. The procedures may be scientifically valid, but will be largely impractical for routine regulatory determinations.
- **The proposed definitions do not exclude wet weather/stormwater conveyance or treatment systems.** The proposed rule would include wet weather or stormwater conveyance and treatment systems as regulated *waters of the U.S.* This result is unrealistic and unsound from the scientific perspective. The application to current regulated efforts to treat and manage stormwater through pipes, conveyances, and other engineered structures, or through passive green infrastructure practices, would result in these activities being categorized as *waters of the U.S.* EPA has indicated in the Q&A related to the rule that this is not the intention, but language in the rule should be added to the exemptions in order to clarify this.
- **The proposed rule will impose a significant impact on available resources to implement CWA program requirements.** If the issues related to the definitions, and uncertainty about how EPA and ACOE administration of the terms described above are not addressed, the number of water bodies needing to be assessed, water quality standards established, and determinations of impairment will significantly increase. For example, a shallow subsurface aquifer with an established connection to a water body into which septic systems discharge under the proposed rule could now be defined as jurisdictional triggering the need for an NPDES permit to discharge. Would the aquifer itself also have to be assessed, added to the list of water bodies and defined as impaired or not?
- **As written, many of the proposed definitions have the potential to expand the scope of "CWA jurisdictional" waters.** This will result in states expending a significant amount of resources assessing, listing, and issuing NPDES discharge permits for activities that have traditionally, and should continue to be, treated as a non-point sources, with no real meaningful benefit to protection of water resources in Pennsylvania. For example, discharges from best management practices for the treatment of stormwater runoff, individual discharges to MS4 systems, and septic systems discharging into an aquifer with an established hydrologic connection could all potentially be subject to NPDES permit requirements, even though they are all subject to state law regulations

and permit requirements. States do not have the resources to deal with the increase in workload that this change could potentially cause, without any increased water quality protection.

- **To address some of the problems described above, Pennsylvania proposes the following specific revisions to definitions in the rule:**
  1. Neighboring—Delete "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."
  2. Floodplain—Define moderate to high water flows in term of a certain rain event. The lands adjoining a channel or conveyance that have been or may be expected to be inundated by flood waters in a 100 year frequency flood.
  3. Tributary—Define to mean a channel or conveyance of surface water having both defined bed and banks, whether natural or artificial, with perennial or intermittent flow that flows to a larger stream or other body of water; the "bed" being the bottom/substrate area/base of the channel or conveyance; and "banks" being the break in slope between the edge of the bed of the channel and the surrounding terrain and generally parallel to the channel or conveyance.
  4. Significant nexus—Terms like "significantly", "speculative" or "insubstantial" are too subjective. A scientifically defensible definition of significant, based on water quality assessment, health standards, *etc.* is necessary.
  5. Significant nexus—Delete the "case-specific basis" for other waters.

Conclusion

Pennsylvania respectfully requests EPA and ACOE to withdraw this proposed rulemaking, and to amend the rule after careful consideration of the comments, further collaboration with states, and public hearings. The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs.

GEORGE D. GRIEG, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

November 14, 2014

Water Docket,
Environmental Protection Agency,
Washington, D.C.

Re: Proposed Rulemaking: Definition of "*Waters of the United States*" Under the Clean Water Act (79 FR 22188, April 21, 2014)

To Whom It May Concern:

Enclosed please find the Pennsylvania Department of Agriculture's (PDA) comments on the United States Environmental Protection Agency's (EPA) proposed rulemaking: Definition of "*Waters of the United States*" Under the Clean Water Act (79 FR 22188, April 21, 2014).

Pennsylvania respectfully requests EPA and Army Corps of Engineers (ACOE) to withdraw this proposed rulemaking, and to amend the rule after careful consideration of the comments, further collaboration with states, and public hearings. The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs.

Should you have any questions or need additional information, please contact me by e-mail at *ggreig@pa.gov* or by telephone at 717–783–6986.

Sincerely,

George D. Grieg

GEORGE D. GRIEG,
Secretary.

Commonwealth of Pennsylvania, Department of Agriculture

Comments on the U.S. Department of Defense, Department of the Army Corps of Engineers and U.S. Environmental Protection Agency

*Proposed Rulemaking: Definition of "**Waters of the United States**" Under the Clean Water Act (79 FR 22188, April 21, 2014)*

General Comment

The Commonwealth of Pennsylvania is home to more than 59,000 farms and 7.7 million acres of farmland. The agriculture industry contributes $74 billion in total economic impact to the Commonwealth. Pennsylvania also has abundant and precious water resources that our farmers work hard to protect, with approximately 86,000 miles of streams, 404,000 acres of wetlands, 161,445 acres of lakes, 17[2] miles of the Delaware estuary, and 63 miles of Great Lakes shore front.[1] These "waters of the Commonwealth" have long been protected in Pennsylvania by a network of state laws. These regulations constitute a robust, comprehensive and effective regulatory framework for protection of waters of the Commonwealth.

The Pennsylvania Department of Agriculture (PDA) is frustrated and disappointed to discover that in formulating this rulemaking, EPA is relying on inadequate and inaccurate information regarding the breadth and scope of state law programs. It is of great concern to PDA that, despite delegation agreements referencing existing state laws, and the routine interaction with the state Department of Environmental Protection (DEP), EPA would rely on the 2013 Environmental Law Institute ("ELI") study titled: *State Constraints—State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*. This assessment is named as background information supporting the rulemaking,[2] in articles[3] and in public presentations by EPA officials,[4] although it is not cited in the rulemaking. One of PDA's main concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is *needed* because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with states.

Pennsylvania does in fact have a significant and robust regulatory program that reaches beyond the Federal Clean Water Act. Pennsylvania's approach in fact could serve as a model for the cooperative federalism at the heart of the Clean Water Act, which envisions a Federal-state partnership in the oversight and protection of the nation's waters with the Federal law providing a broad general regulatory framework that relies on and supports strong state programs specifically tailored to the unique attributes of each state.

PDA is very concerned that the EPA and the Corps (the agencies) have proposed this rule without engagement with state and local authorities, consideration of their prerogatives and budgets, or without realistically examining the potential economic and legal impacts on agriculture. Pennsylvania believes the proposed rule is ill-conceived and exceeds the legal and statutory boundaries of the CWA. Rather than clarify the intent of Congress and the Supreme Court, the proposed rule would add complexity and uncertainty, disrupt the timely use of FIFRA-registered pesticide products, and cause significant adverse economic impacts to state departments of agriculture and other agencies.

The proposed rule confuses Federal control with environmental protection. It is likely to curtail many voluntary water quality improvement projects if such projects would trigger cost and delay of seeking Federal permits. Such unintended consequences are precisely why the agencies need to better engage state and local governments and affected industries such as agriculture.

PDA believes EPA and the Corps must withdraw the proposed rule and initiate significant discussions with states and other affected stakeholders. We urge the agencies to initiate a replacement rulemaking that reflects those consultations and is supported by science and case law.

Specific Comments

---

[1] *2012 Pennsylvania Integrated Water Quality Monitoring and Assessment Report.*

[2] *http://www2epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act.*

[3] *http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30.*

[4] June 13, 2014, Berks County, EPA Official Nancy Stoner.

1. **The proposed rule was premature in relation to the ongoing discussions with the Scientific Advisory Board (SAB).** On the same day the draft *Connectivity* report was released to the public, the proposed rule was sent to the Office of Management and Budget (OMB) for interagency review. This is inappropriate and prevented the public from being able to provide meaningful comments on the proposed rule. The *Connectivity* report is the scientific basis the agencies rely on to support their proposed rule. The science should have been final prior to the proposed rule being developed.

   Recently the agencies extended the public comment period, and weeks later the final *Connectivity* report was released. This extension fails to rectify the procedural failures of the agencies for not providing a *final* report in the proposed rule for comment when the rule was first released. The process of simultaneously evaluating the science during the comment process provides a major obstacle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. It also implies that the scientific basis provided in the draft rule is irrelevant.

2. **Pennsylvania is not experiencing the purported confusion that is one of the drivers for the rule.** Our state law jurisdiction is common-sense in application and does not generate confusion. As the foundation of our delegated NPDES program and the basis for the ACOE's Pennsylvania State Programmatic General Permit, our state law based programs are effective. Clarification or expansion of Federal CWA jurisdiction is not needed from Pennsylvania's perspective.

3. **One size does not fit all.** EPA asserts that protection of the 60 percent of nation's stream miles that flow only seasonally[5] is an important objective of the rule. However, Pennsylvania is not a state for which the majority of stream miles only flow seasonally. Further, to the extent Pennsylvania streams have seasonal flow, they are protected under state law. Administering a detailed and specific but "one-size-fits-all" definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections.

4. **The proposed rule as drafted creates more confusion than it clarifies.** PDA is disappointed in the proposed rule's lack of clarity due to ambiguous or undefined terms and phrases. Terms and phrases throughout the proposal are left undefined, or the definition is left so ambiguous that farmers will be left wondering, with no possible way of determining, whether waters on their property will be jurisdictional or not. The proposed rule only increases confusion.

   For example, the "significant nexus" is the lynchpin concept of the agencies' proposed rule, but the rule provides no metrics or criteria for how to measure "significance" of effects. Moreover, the proposed rule identifies factors that could be evidence of a significant nexus but provides no guidance on when the presence of these factors rise to the level of significance and instead seems to suggest that merely the presence of any of these factors is sufficient to satisfy the significant nexus standard.

   Additional uncertainty is created by:

   - according "interstate waters" the same status as traditional navigable waters while failing to provide a definition of "interstate waters,"
   - allowing certain features to be considered jurisdictional based on their rela tionship to "impoundments" while leaving "impoundment" undefined,
   - using the confusing concept of ordinary high water mark (OHWM) as the key identifier for tributaries,
   - extending the concept of "adjacency" to non-wetlands without providing a limit to "waters" that can be considered adjacent,
   - relying on vague and undefined concepts such as "floodplain," "riparian area," and "shallow subsurface hydrologic connection" to identify "adjacent waters,"
   - creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria, and

[5] Pennsylvania uses the terminology "intermittent stream" and "perennial stream" rather than seasonal. 25 PA Code § 102.1.

- allowing for exempted features, such as groundwater, gullies, and rills to serve as connections that can render a feature jurisdictional "adjacent water" or "other water."

These are just a few examples of the ambiguity and uncertainty created by the proposed rule. Unfortunately each of these examples fails to provide the necessary clarity on which to base a regulatory program and will likely cause regulatory confusion, inconsistency, and litigation.

5. **The agencies did not adequately consider adverse impacts on rural communities and small agribusinesses.** Throughout this rulemaking process, the Agencies have failed to engage with the states, as required by Executive Order 13132 (Federalism), or the small business community, as required by the Regulatory Flexibility Act (RFA). Instead, the Agencies certified, without any supporting analysis, that "this proposed rule will not have a significant impact on a substantial number of small entities" because, in their opinion, "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations." There is no factual basis for this certification. It is based on several false assumptions: That the jurisdictional scope of the proposed rule is smaller than existing regulations, all the impacts of the proposed rule will be "indirect" and such impacts on farmers, ranchers and small agribusinesses will be insignificant.

   Even a cursory analysis indicates that the revised definition will have a significant economic impact on a substantial number of small entities and on the states. Notwithstanding impacts on state agriculture and water programs, the proposed rule will have dramatic impacts on farmers, supporting agribusiness companies, and the infrastructure of small rural communities. The specter of new Federal regulations for traditional stakeholder activities in and around previously-unregulated marginal conveyances, ditches or other land features on farms and rural communities speaks volumes about likely impacts on such small entities. PDA is convinced the agencies have not adequately considered small business impacts in the development of the proposal.

6. **The proposed rule results in limitless Federal authority and is inconsistent with limits set by Congress and recognized by the Supreme Court.** Pennsylvania is concerned that under the proposed rule, the agencies' authority to assert jurisdiction is limitless. The proposed rule confuses Federal control with environmental protection. Where in the past, jurisdiction was based on a site-specific analysis, the proposed rule creates broad categories of waters that would now be considered jurisdictional by rule. For example, under the proposed rule, remote features on the landscape that carry only minor water volumes (*e.g.,* ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, and man-made drainage ditches), would now automatically be subject to Federal CWA jurisdiction.

   In addition, under the proposed rule, waters and wetlands are regulated if they are "located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have "a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[6] The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval.[7] The proposal also fails to provide the limits of "shallow subsurface hydrological connections" that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agencies.[8]

   Inconsistent with the limits established by Congress and recognized by the Supreme Court, the proposed rule creates sweeping jurisdiction based on connections under newly devised theories such as "any hydrological connection," "significant nexus," "aggregation," and new definitions and key regulatory terms such as "tributary," "adjacent waters," and "other waters." Through use of the broad definition of "tributary" the agencies will extend jurisdiction to any channelized feature, (*e.g.,* ditches, ephemeral drainages, stormwater conveyances), wetland, lake or pond that directly or indirectly contributes flow

[6] 79 *Fed. Reg.* at 22262–63.
[7] *Id.* at 22208.
[8] *Id.*

to navigable waters, without any consideration of the duration or frequency of flow or proximity to navigable waters.[9]

The rule also proposes to expand "adjacent waters," to include any wetland, water, or feature located in an undefined floodplain or riparian area, or that has a sub-surface hydrologic connection to navigable waters.[10] A new catch-all "other waters" category would include isolated waters and wetlands that, when aggregated with all other wetlands and waters in the entire watershed, have a "more than speculative or insubstantial" effect on traditional navigable waters.[11] Under the proposed rule, ditches, groundwater and erosional features (*i.e.,* gullies, rills, and swales) can serve as a subsurface hydrological connection that would render a feature a jurisdictional "adjacent water" or demonstrate that a feature has a "significant nexus" and is therefore a jurisdictional "other water."[12] Such far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow was not what Congress intended and goes far beyond even the broadest interpretation of recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001) (*SWANCC*), and *Rapanos* v. *United States,* 547 U.S. 715 (2006).

7. **The proposed rule will have direct and substantial effects on other state programs, such as soil conservation, nutrient management, pesticide regulation, *etc.* Examples include the following:**

   - State conservation programs that stress edge-of-field practices to limit flooding, contaminated runoff and soil erosion could be adversely affected if in-field conveyances are deemed WOTUS under one of the new categories or through BPJ determination of a "significant nexus." Farm bill stewardship programs administered at the state level will have to be evaluated to properly embrace the expansion of jurisdictional waters under this proposed rule.
   - State pesticide programs and regulations will need to be reevaluated under the proposed WOTUS rule. Some labeled uses of pesticide products could be jeopardized by the proposed federalization of ephemeral conveyances and ditches; for example, when farmers, natural resource managers and others seek to use terrestrial pesticides with labels that state "do not apply to water" or require no-spray setbacks from jurisdictional waters to avoid potential spray drift. Confusion over what are Federal "waters" may expose pest-control operators to legal uncertainty under CWA and/or FIFRA, and threaten effective pest management in certain topographies.

Conclusion

Pennsylvania respectfully requests EPA and Army Corps of Engineers (ACOE) to withdraw this proposed rulemaking, and to amend the rule after careful consideration of the comments, further collaboration with states, and public hearings. The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs.

SUBMITTED LETTER BY HON. MICHELLE LUJAN GRISHAM, A REPRESENTATIVE IN CONGRESS FROM NEW MEXICO; ON BEHALF OF STEVE MOYER, VICE PRESIDENT OF GOVERNMENT AFFAIRS, TROUT UNLIMITED

March 17, 2015

Hon. GLENN THOMPSON,
Chairman,
Subcommittee on Conservation and Forestry,
House Committee on Agriculture,
Washington, D.C.;

Hon. MICHELLE LUJAN GRISHAM,

---

[9] 79 *Fed. Reg.* at 22201.
[10] *Id.* at 22206.
[11] *Id.* at 22211.
[12] *Id.* at 22219.

Ranking Minority Member,
Subcommittee on Conservation and Forestry,
House Committee on Agriculture,
Washington, D.C.

Dear Chairman Thompson and Ranking Member Lujan Grisham:

On behalf of Trout Unlimited's (TU) 150,000 members nationwide, I am writing to provide testimony for your March 17, 2015, hearing on the Clean Water proposal from the Army Corps of Engineers (Corps) and the EPA. I ask that you please include our letter in the hearing record.

TU strongly supports the proposed rule because it will clarify and strengthen the very foundation of the Clean Water Act's protections for important fish and wildlife habitat, especially the small headwater streams that serve as the keystone of watershed health. Based on our experience working in the field with the Clean Water Act, and the detailed analysis completed by the U.S. Army Corps of Engineers, EPA, and OMB for the proposal, we believe that the clean water proposal is worthy of your thoughtful consideration. When it is finalized, it will provide landowners, conservationists, and businesses with substantial improvements in how the law is implemented.

In that light, we urge the Subcommittee to review the final rule when it is completed in the coming months. The agencies have conducted hundreds of stakeholder meetings and have considered over one million comments on the draft. I am pleased to note that more than 85% of the comments supported the proposal. I believe that the final draft will contain changes designed to fix the constructive criticisms that some have been offered during the comment period, resulting in a clearer, stronger final product.

I want to take a moment to talk about how vitally important the Clean Water Act is to TU's work, and to anglers across the nation. Our mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. Our volunteers and staff work with industry, farmers, and local, state and Federal agencies around the nation to achieve this mission. On average, each TU volunteer chapter annually donates more than 1,000 hours of volunteer time to stream and river restoration and youth education. The Act, and its splendid goal to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" serves as the foundation to all of this work. Whether TU is working with farmers to restore small headwater streams in West Virginia, removing acidic pollution caused by abandoned mines in Pennsylvania, or protecting the world famous salmon-producing, 14,000 jobs sustaining watershed of Bristol Bay, Alaska, we rely on the Clean Water Act to safeguard our water quality improvements.

Conservation of our nation's water resources is not only critically important to TU, but also to the success of the agriculture industry. Partnering with farmers and ranchers is an integral part of the work that we do. In the Midwest Driftless Area (southwest Wisconsin, southeast Minnesota, northeast Iowa, and northwest Illinois), TU's work with dairy farmers has restored watersheds and tripled trout populations in some streams, creating excellent fishing opportunities for sportsmen throughout the upper Midwestern states. In West Virginia, working with dairy farmers and beef ranchers, TU has installed over 1 million feet of stream-side fencing to reduce the impacts of cattle on streams, while adding upslope water sources to allow cattle access to water. Additionally, TU has worked extensively with ranchers and landowners in many parts of the western United States to upgrade irrigation infrastructure to improve agriculture production while keeping more water in streams to aid watershed health. Much of this good work was funded by farm bill conservation dollars flowing to our agriculture partners.

In our view, the protections for watersheds provided by the Clean Water Act, and the restoration programs provided by the farm bill, fit beautifully together.

Unfortunately, the nation's clean water safety net is broken, and if you appreciate clean water and the Clean Water Act, then you will appreciate the agencies' efforts to resolve the law's most fundamental question: which waters are—and are not—covered by the Clean Water Act.

Over the last 15 years, agency guidance following a series of Supreme Court decisions have weakened and confused these protections. The agencies' proposal takes important steps to clarify and restore protections to intermittent and ephemeral streams that may only flow part of the year. These intermittent and ephemeral streams provide habitat for spawning and juvenile trout, salmon, and other species, and protecting these streams means protecting the water quality of larger rivers downstream. Thus, sportsmen strongly support the reasonable efforts embodied in the proposal from the agencies to clarify and restore the protection of the Clean

Water Act to these bodies of water where we spend much of our time hunting and fishing.

I hope that the Subcommittee recognizes the fact that, because of the uncertainties caused by the Supreme Court cases, a rulemaking was sought by many business interests, as well as by Supreme Court Justice Roberts who presided over the *Rapanos* case.

I also urge the Subcommittee to recognize that the proposal works to clarify what waters are **not** jurisdictional. The proposed rule and preamble reiterates all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, and forestry activities. These exemptions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. Finally, we believe that the final rule must, and likely will, include even greater clarity on agricultural exemptions.

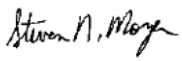
As highlighted above, TU works with farmers, ranchers, and other landowners across the nation to protect and restore trout and salmon habitat. We have a keen interest in ensuring that the proposal works well for producers on the ground.

We also urge the Subcommittee Members to remember the great, and direct, benefit that clean water and healthy watersheds provide to their districts and states. Pennsylvanians, for example, depend on thousands of miles of rivers and streams for clean and abundant drinking water, diverse and abundant fish and wildlife habitat, and local fishing, hunting, bird-watching, and boating recreation that support a strong outdoor recreation economy. According to the Fish and Wildlife Service, more than 1.1 million people fished and 775,000 people hunted in Pennsylvania in 2011. Together, they directly spent more than $1.4 billion on gear and trip expenditures alone. These hunting and fishing economies depend on healthy habitat and clean water. They depend on the Clean Water Act.

Last, the Clean Water Act and the farm bill, passed last year under the able leadership of you and your Subcommittee, go hand in hand, creating opportunities for producers and conservationists to work together in watershed management. While the farm bill provides the funding and projects for producers to update aging infrastructure and more effectively manage their land, the new Clean Water rule will provide clarity and allow producers to continue with these practices with predictability. The farm bill has spurred fish habitat restoration on agricultural land. The Clean Water Act offers protections which ensure that those conservation gains are not undermined by pollution and habitat degradation in other parts of the watershed. This partnership between agriculture and conservation is an essential piece of protecting our nation's water resources and the fish and wildlife that rely on it.

Your Subcommittee helped to give birth to the new farm bill last year. In 1972, Congress gave birth to the Clean Water Act. These laws do, and should even more so over time, work together. But the Clean Water Act has come to a major crossroads. The agencies which the Congress authorized to implement the Clean Water Act, spurred by the Supreme Court itself and a wide range of stakeholders, have put forth a proposal that will help strengthen the very foundation of the law for years to come. As you scrutinize the proposal, we urge you to strongly consider the views of sportsmen and women in Pennsylvania, New Mexico, and others around the nation, and support the reasonable and science-based efforts of the Corps and EPA to clarify and restore the Act's jurisdictional coverage.

Thank you for considering our views,



STEVE MOYER,
Vice President of Government Affairs,
Trout Unlimited.

SUBMITTED STATEMENT BY HON. MICHELLE LUJAN GRISHAM, A REPRESENTATIVE IN CONGRESS FROM NEW MEXICO; ON BEHALF OF JOE LOGAN, PRESIDENT, OHIO FARMERS UNION

Introduction

On behalf of the family farmers, ranchers and rural members of Ohio Farmers Union, thank you for the opportunity to testify regarding the Environmental Protection Agency and Army Corps of Engineers' proposed changes to the definition of "*waters of the U.S.*" OFU was organized in 1934. We work to protect and improve the well-being and quality of life of family farmers, ranchers and rural communities

in Ohio and throughout the country by promoting grassroots-derived policy adopted annually by our membership. OFU members represent producers of varied commodities, crops, and livestock employing varied practices, but hold in common reliance on and good stewardship of our shared water resources.

Clean water is vital to the productivity and well-being of America's farms, ranches and rural communities. The Clean Water Act (CWACWA seeks to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[1] OFU's members understand the importance of respecting clean water as a shared resource and believe the integrity of the nation's water can be protected without unnecessarily encumbering the activities of the regulated community.

The EPA and Corps' (agencies) stated goal for the proposed rule is to improve protection of public health and water resources while increasing certainty for the regulated community and reducing troublesome and costly litigation. Protecting the nation's water resources is a complicated matter, and so by necessity are the CWA and any rule implementing it. This topic requires careful consideration and measured discourse over the legitimate concerns facing the regulated community. This proposed rule is so important because all discharges made to *waters of the United States* from point sources require a National Pollutant Discharge Elimination System (NPDES) Permit under the CWA. A discharge is any addition of a pollutant to a "water of the United States," including dredge or fill material. Although normal farming, silviculture and ranching activities are exempt from dredge and fill requirements under § 404(f)(1)(A) of the CWA and certain activities pursuant to agriculture are exempted from NPDES permitting requirements under § 402, the legal basis for the regulation of many construction and business activities rests on the definition of "*waters of the United States*."

It is not satisfactorily clear whether the proposed rule, in its present form, would implement policies that OFU supports. However, OFU's members recognize the agencies' rulemaking process on this matter as an opportunity to achieve their policy goals because the current regulatory landscape allows for inconsistent determinations that expand the CWA's definition of jurisdictional waters. The purpose of the following testimony is to provide the agencies with advice for drafting a final rule that does not increase CWA jurisdiction and promotes consistent application of EPA policies, which aligns with the agencies' stated intent. OFU will oppose a rule that does not respect these critical components of the organization's policy. This testimony will help the agencies avoid language that, even when drafted in good faith, could be taken out of context and used to stretch CWA jurisdiction in the future.

The agencies' stated intent is to replace inconsistent practices with clear, bright-line tests through this proposed rule. If the testimony below is given proper consideration, the final rule will allow the regulated community the certainty it needs to conduct its business free from fear of undue regulatory interference and without sacrificing the agencies' ability to protect the United States' water resources. The proposed rule warrants comments on the agencies' changes to the definition of "*waters of the United States*" and the exclusions of certain waters from that definition.

I. Proposed Definition of "*waters of the United States*."

"Tributary"

The CWA establishes the agencies' permitting jurisdiction over specifically-listed waters. Paragraphs (a)(1)–(a)(5) of the proposed rule restate well-settled tenets of the agencies' jurisdiction under the CWA and do not warrant further comment. However, section (a)(5)'s inclusion of "All tributaries of waters identified in paragraphs (a)(1) through (4) of this section" warrants examination. This language has invoked significant concern in the regulated community that the proposed rule would increase the jurisdictional reach of the CWA. The agencies should address this concern and confirm this language does not increase jurisdiction by incorporating the following points in the final rule.

The preamble to the proposed rule notes that the proposed rule sets forth, for the first time, a regulatory definition of "tributary." The proposed rule defines "tributary"[2] as "a water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section."[3] In order to provide more clarity to the regulated community, the agencies should note in the final rule that these features take years to form. This should mitigate concern that temporary accumulations directly related to isolated rain events will

[1] 33 U.S.C. § 1241(a).

[2] *Definition of "**Waters of the United States**" Under the Clean Water Act,* 79 FED. REG. 22198, (proposed April 21, 2014) (amending 33 CFR § 328.3).

[3] *Id.* at 22263.

be considered jurisdictional. The agencies should add further clarifying language, including but not limited to descriptive examples of water and events that are not considered tributaries, in the final rule in order to ensure these distinctions are well-understood in the regulated community.

The preamble notes that existing Corps regulations define the ordinary high water mark (OHWM) "as the line on the shore established by fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e)."[4] The agencies should incorporate this definition within the final rule so that the regulated community can refer to one place for as much of the information that is needed to maintain compliance as possible.

These points should ensure that the definition of "tributary" in the proposed rule will not bring any water into jurisdiction that would not be found jurisdictional under the "significant nexus" test that is applied to "other waters." If incorporated, they would create regulatory certainty and lessen administrative burden by settling jurisdiction for waters that would have been subject to a case-by-case determination but ultimately found jurisdictional.

Also, the proposed rule treats wetlands that are connected to tributaries as tributaries themselves, but the preamble requests comment on this approach and offers an alternative.[5] Wetlands should not be considered tributaries. Treating wetlands as tributaries would negate the bed, bank and OHWM criteria the Corps uses for identifying tributaries. The agencies should enact the alternative proposed in the preamble and "clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional *waters of the United States* under (a)(6)." This alternative creates a bright-line definition for "tributary" without relinquishing any opportunities to protect water resources.

"Adjacent"

The proposed rule would change section (a)(6) from an articulation of the CWA's jurisdiction over wetlands adjacent to "*waters of the United States*" to an explanation of the CWA's jurisdiction over "All waters, including wetlands, adjacent to" waters identified in (a)(1) to (a)(5) as jurisdictional. As with the definition of "tributary" discussed above, this change is causing apprehension among the regulated community. The agencies should consider the following points in drafting the final rule to make clear that this change does not expand jurisdiction.

The proposed rule defines "adjacent" as "bordering, contiguous or neighboring" at (c)(1). It notes further that "Waters, including wetlands, separated from other *waters of the United States* by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'"

The jurisdictional reach of "adjacent waters," then, is largely dependent on the definition of "neighboring." This proposed rule defines "neighboring" for the first time. The preamble notes that the term is currently applied broadly, but the proposed rule defines "neighboring" as "waters located within the riparian area or floodplain of a water identified in (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water."[6]

Waters located in the riparian area or floodplain of a jurisdictional water, or with a confined surface hydrologic connection to a jurisdictional water, would be found jurisdictional under the "significant nexus" test, even without the proposed rule's explanation of jurisdiction over adjacent waters. This inclusion of "adjacent waters" as per se jurisdictional increases certainty for the regulated community and alleviates administrative burden without increasing the CWA's jurisdictional reach.

The preamble explains that, to date, the agencies' professional judgment has been a factor in determining matters of adjacency. "The agencies recognize that this may result in some uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an 'adjacent' water." The preamble then specifically requests comments on options for providing clarity and certainty on these matters.

One of the proposed alternatives put forth by the agencies is "asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian area

[4] *Id.* at 22202.
[5] *Id.* at 22203.
[6] *Id.* at 22207.

of a jurisdictional water."[7] This is the proper way to address these waters. It creates certainty for the regulated community since waters located a substantial distance from a jurisdictional water would not be subject to jurisdiction due to an insubstantial connection to the jurisdictional water. Even in the current regulatory framework, the agencies consider distance from a jurisdictional water when determining whether a water that is located outside the floodplain or riparian area of the jurisdictional water, but that is connected to the jurisdictional water by a shallow subsurface or confined surface hydrologic connection, is adjacent to that jurisdictional water.[8]

This alternative also reserves to the agencies the ability to address waters that could actually have a consequential impact on the quality of a water of the United States, since the water located outside the floodplain and riparian area of the jurisdictional water, unless otherwise excluded, would be subject to the "significant nexus" test. Holding the definition of "adjacent water" to waters within a jurisdictional water's floodplain or riparian area allows the regulated community maximum certainty without encumbering the agencies' ability to protect water resources.

The agencies also request comment on whether a water with only a small confined surface or shallow subsurface hydrologic connection to a jurisdictional water should be exempt if it is outside a specified distance from the jurisdictional water. For the same reasons why the best approach to "adjacent waters" is to limit the category to waters within the floodplain or riparian area of a jurisdictional water as discussed above, placing a cap on the distance from a jurisdictional water within which other waters may be considered "adjacent" is a second-best alternative. Under this approach, more waters that do not have the actual ability to affect the water quality of a jurisdictional water will be considered jurisdictional than the "floodplain and riparian area-only" alternative. This will result in greater administrative burden for the regulated community and the agencies. However, a bright-line rule limiting the area surrounding a jurisdictional water in which a water may be found "adjacent" could still be referenced, increasing certainty compared to the regulatory framework as it exists today.

The preamble also asks for specific comment "on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water."[9] The agencies should uniformly use a 20 year flood interval zone when evaluating these waters. This will provide the regulated community with certainty without inhibiting the agencies' ability to protect *waters of the United States*, since waters not captured within this zone will still be jurisdictional under the "significant nexus" test if they have the potential to impact a jurisdictional water.

The agencies should also provide clarity to the regulated community by stating in the final rule, "mere proximity to a jurisdictional water is not cause for a determination that a water is jurisdictional as 'neighboring' or 'adjacent,' and a scientifically-verifiable, substantial surface connection must be present for any water outside a floodplain or riparian zone to be found jurisdictional."

"Significant Nexus"

Other waters not covered by the above-discussed jurisdictional categories may fall within the CWA's jurisdiction if a case-by-case determination is made finding the water has a "significant nexus" with a water identified in sections (a)(1) through (3).

The proposed rule at section (c)(7) says "The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (*i.e.,* the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section." The proposed rule also states "Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of this section." The agencies intend that this language more precisely describes the scope of jurisdiction by explicitly leaving out waters that have a mere commercial connection to navigable waters and codifies the agencies' practice since the Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).

---

[7] *Id.* at 22208.
[8] *Id.*
[9] *Id.* at 22209.

The term "similarly situated" must be examined, since it allows the agencies to consider multiple waters together in making "significant nexus" determinations. The prerequisite condition for "other waters" to be considered "similarly situated," before any assessment of geographic proximity to additional "other waters" or jurisdictional waters, is performance of similar functions. The preamble further explains that a "similarly situated" determination requires an evaluation of whether waters in a region "can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas," and whether waters are "sufficiently close" to each other or a jurisdictional water.[10]

The description of "similarly situated" waters above includes so many variables that it would be difficult for the regulated community to accurately anticipate the outcome of such a determination, opening the door to increased uncertainty. To give the regulated community more clarity in anticipating the results of "similarly situated" evaluations, the agencies should provide a list of functions that a group of waters must perform together in order to be considered "similarly situated." These functions include affecting the reach and flow of a jurisdictional water and allowing or barring the movement of aquatic species, nutrients, pollutants or sediments to a jurisdictional water.

The agencies should also require "other waters" to have a confined surface connection to each other in order to be considered "similarly situated." This distinction would be helpful to the agencies and to the regulated community because "other waters" that are completely separate and distinct from a jurisdictional water will not be able to form a significant nexus with a jurisdictional water cumulatively unless they maintain such a nexus individually or with each other. The final rule should also strictly limit the distance allowed between separate waters that can be considered "similarly situated."

Otherwise, no "other waters" should be determined to be similarly situated, as the agencies put forth as an alternative in the preamble.[11] The limited environmental benefit of bringing waters that would not trigger jurisdiction by themselves into jurisdiction as "similarly situated" does not justify the uncertainty and administrative burden that would be created for the agencies and the regulated community. The "significant nexus" evaluation ensures that waters of genuine concern are jurisdictional.

The agencies request comment as to whether the agencies should evaluate all "other waters" in a single point of entry watershed as a single landscape unit for purposes of determining whether these "other waters" are jurisdictional.[12] This would create substantial negative economic impact by unduly imposing a regulatory burden on many waters that cannot affect the integrity of "*waters of the United States*." It would also increase the agencies' administrative load without a return of environmental benefit, since the agencies would have to perform more case-by-case jurisdictional determinations. Since this approach to evaluating "other waters" would create significant administrative burden for the agencies and the regulated community, and would not produce an environmental benefit, the agencies should not include this approach in the final rule.

Additional Clarity

The agencies can alleviate agriculture's concerns by noting that waters not listed under section (b) of the proposed rule are not jurisdictional by default and will not be considered within CWA jurisdiction unless they fall into one of the categories listed in sections (a)(1) to (a)(7).

The agencies should also make clear in the final rule that any wetland determination made by the Department of Agriculture's Natural Resources Conservation Service (NRCS) will be considered final and ruling. While NRCS' wetlands determinations are not jurisdictional determinations, the ability to rely on NRCS' decisions regarding the presence of a wetland would increase clarity for the regulated community, reduce the agencies' administrative burden and prevent inconsistent wetland determination.

II. Excluded Waters and Exempted Activities

Ditches

In section (b) of the proposed rule, the agencies list several categories of waters that are explicitly excluded from the definition of "*waters of the United States*," placing them outside the jurisdiction of the CWA. The proposed rule specifically ex-

[10] *Id.* at 22213.
[11] *Id.* at 22215.
[12] *Id.* at 22217.

cludes two types of ditches that otherwise would have been subject to a case-by-case determination, increasing regulatory certainty and reducing the CWA's jurisdictional reach. The exclusion of these ditches increases certainty for the regulated community without impairing the agencies' ability to protect the nation's water resources.

Sections (b)(3) and (b)(4) explain the circumstances in which a "ditch" is not a "water of the United States." These sections exclude ditches that do not contribute flow, directly or through other waters, to a "water of the United States," and any ditches that are wholly within an upland and drain only uplands and are without perennial flow. These explicitly-stated exclusions do not interfere with the CWA's objective of protecting water resources because the ditches concerned are unlikely to impact the integrity of *waters of the United States*. The exclusions at (b)(3) and (b)(4) will give the regulated community added certainty, allowing them to conduct their business without fear of regulatory action.

With regards to section (b)(3), the preamble states "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)."[13] The agencies should restate this description of "upland ditches" as a definition of "uplands" by writing, "an upland is any land that is not a wetland, floodplain, riparian area or water." This definition should be included in the final rule in order to provide clarity.

The agencies should provide further clarity to the regulated community by defining "perennial flow" in section (c) of the final rule. The description of "perennial flow" in the preamble[14] could be altered slightly to function as the definition, codifying that "perennial flow" is "the presence of water in a tributary year round when rainfall is normal." Including this definition in the final rule would reduce the administrative burden for members of the regulated community as they attempt to maintain compliance with the CWA.

The agencies request comment on whether perennial flow is the proper distinction to use in separating excluded ditches from ditches that may be jurisdictional under section (b)(3).[15] Given the agencies' stated goal of providing clarity to the regulated community, perennial flow is the proper distinction. The presence or absence of perennial flow is easily-verifiable. Using perennial flow as the distinction allows the regulated community to be confident in their own assessment of ditches, which encourages the normal course of business and reduces unexpected enforcement actions. It also checks the agencies' administrative burden, since the presence or absence of perennial flow would also be easier for the agencies to verify than intermittent flow.

Exemptions for Agricultural Activities

The preamble indicates that the proposed rule does not affect existing regulatory exemptions for agricultural activities.[16] There is nothing in the proposed rule that calls this assertion into question. Some of these exemptions are referenced in the "Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices" (Interpretive Rule), which was published on the same day as the proposed rule.[17] The Interpretive Rule states the list of exempted practices is illustrative rather than exhaustive and the CWA exempts those, like other activities conducted in the normal course of agriculture production, including conservation activities, are also exempted from CWA permitting requirements. In order to provide the regulated community with increased certainty, the agencies should consider codifying the Interpretive Rule and adding language explicitly stating that engaging in these exempted activities does not invoke any reporting requirement or other obligation to the agencies, including when these activities take place on land newly brought into farming. The agencies should also explicitly note that conservation activities do not need to follow specific National Resource Conservation Service guidelines for cost-share or technical assistance eligibility when engaging in these activities in order for their actions to remain exempt from permitting requirements.

The proposed rule also specifically continues the exclusion of prior converted cropland from the definition of "*waters of the United States*" at section (b)(2). The proposed rule and preamble's direct confirmation of these matters provides clarity for the regulated community. The agencies should provide further clarity for the regulated community on this point by stating in the final rule, "This rule does not re-

---

[13] *Id.* at 22219.
[14] *Id.* at 22203.
[15] *Id.* at 22219.
[16] *Id.* at 22218.
[17] *http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf*.

quire a permit for any plowing and planting activity that was legally conducted without a permit before this rule was issued." This language captures the intent of the agencies and provides the regulated community with the certainty it needs to continue farming its existing planted acreage without threat of new interference.

III. Miscellaneous Matters

Shallow Subsurface Hydrologic Connections

The existing regulatory framework defining "*waters of the United States*" and the proposed rule assume that a shallow subsurface hydrologic connection is sufficient for finding that waters with this connection to a jurisdictional water are "neighboring" and so jurisdictional themselves as "adjacent waters." Hydrologic science does not support such a uniform determination. Shallow subsurface hydrologic connections should be carefully studied to assess their impacts on jurisdictional waters, and the perennial nature of many of these connections should be taken into account. Further research must be conducted before the agencies determine which, if any, subsurface hydrologic connections can be considered sufficient grounds for finding such waters "adjacent" to jurisdictional waters. Until more scientific evidence is provided, groundwater connections alone should not be used to find non-navigable waters jurisdictional.

Pesticide Applications

The proposed rule does not address pesticide applications other than applications directly to a jurisdictional water. Similarly, it is clear that the proposed rule does not specifically address fertilizer applications. This is not the proper venue for discussing these applications. Future opportunities will arise to work with EPA on these topics, especially the problem of redundant CWA and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulations governing pesticide applications.

Army Corps' Engagement

Given the importance of this rule to the regulated community, the Corps' lack of participation in discussion of this proposed rule is frustrating. The Corps is ultimately tasked with jurisdictional determinations under the final rule. The Corps' refusal to provide any insight on how it plans to interpret and implement the proposed rule undermines the regulated community's confidence that our good faith involvement in the rulemaking process will result in adequate consideration of our help when jurisdictional determinations will actually be made. The Corps must join this discussion immediately.

IV. Conclusion

OFU understands the agencies' stated goal of enhancing protections for our nation's water resources while providing increased certainty to the regulated community. The testimony above reflect OFU's understanding of the proposed rule and explain ways the proposed rule could be improved to more effectively accomplish the agencies' stated goal in the final rule while maintaining conformity with OFU's policy. OFU stands ready to offer further assistance in this regard as the agencies may find helpful. Thank you for your consideration of this testimony.

Sincerely,

JOE LOGAN,
President.

SUBMITTED COMMENT LETTERS BY HON. MICHELLE LUJAN GRISHAM, A REPRESENTATIVE IN CONGRESS FROM NEW MEXICO; ON BEHALF OF:

LYNNE ANDERSEN, NAIOP NEW MEXICO CHAPTER PRESIDENT, NAIOP, COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION

November 13, 2014

Water Docket,
U.S. Environmental Protection Agency,
Washington, D.C.

Attention: Docket ID No. EPA–HQ–OW–2011–0880

Re: Definition of "*Waters of the United States*" under the Clean Water Act

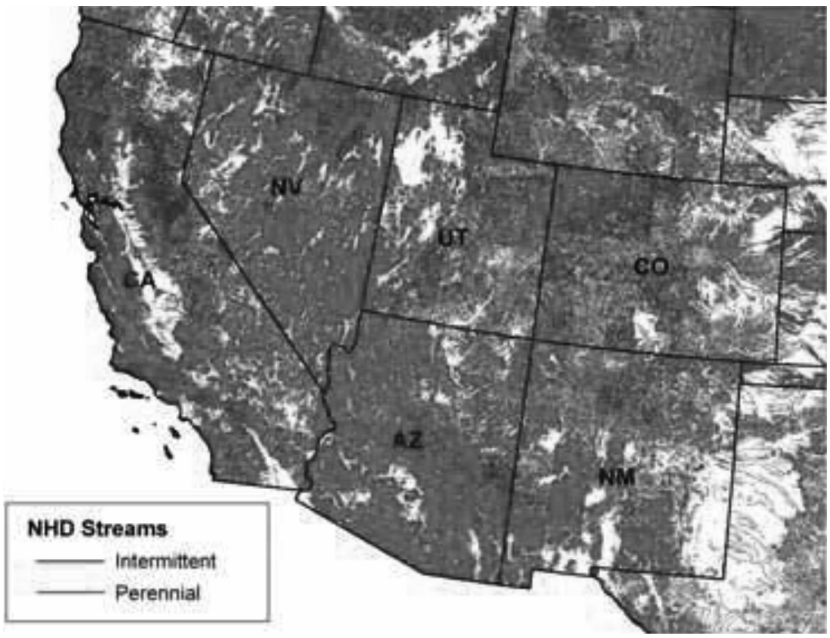
Dear Reviewer:

Please find herein comments on the proposed new definition of "*Waters of the United States*" (WOTUS). These comments are submitted by the New Mexico Chap-

ter of NAIOP, the Commercial Real Estate Development Association. Our association's members are developers, owners, investors, and related professionals involved in building, maintaining and selling office, industrial and mixed-use real estate in and around New Mexico.

Our Chapter agrees with the comments submitted by national NAIOP leadership. However, we also have concerns that are specific to our region. This letter addresses those concerns.

It is not clear to us whether arroyos are intended to be regulated as "ephemeral streams." However, according to page 4–67 of the report issued to support EPA's rulemaking. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Report), "arroyos are ephemeral streams." a. The Report further concludes at page 4–69 that "Many tributary streams to southwestern rivers are ephemeral, but they exert strong influences on the structure and function of the rivers." This suggests that EPA and the Corps intend to regulate intermittent, ephemeral streams such as arroyos as "tributaries." Doing so would increase EPA's jurisdiction dramatically as shown on page 4–57 of the report, which is copied below.



We have several concerns.

1. **The New Definition Does Not Adequately Consider the Varied Nature and Function of "Ephemeral Streams."** First, we feel that it is inaccurate to lump different kinds of intermittent and ephemeral water flows into the category of "ephemeral streams." The function of the "bed and banks" and the contribution of the flow to a regulated water vary among different types of ephemeral streams. Consider the difference among:

   a. A stream that flows seasonally as it is fed by snowmelt. Such a stream is likely to flow at a relatively steady rate until its source melts out in late summer. It will support wildlife and recharge groundwater in a relatively constant manner while it is flowing.

   b. A stream that flows underground in reaches. It is hard to determine whether such a flow is "groundwater" (*i.e.,* unregulated by the Clean Water Act), and surely such a flow bears a strong connection to groundwater. Such a stream-sometimes flowing above ground and sometimes below—could have water flow year round and still fall under the category of "ephemeral streams."

   c. An arroyo (also known as a "wash" or a "gully"). These pathways for storm water runoff have formed naturally over time because, for every upward

wrinkle of the dirt and rock, there is a downward low point into which water has carved a downhill path. In some cases, arroyos flow with rain water runoff very rarely. When they do flow, it can be with a heavy sudden flow that ends soon thereafter.

Each of these examples is a very different type of flow. Lumping them all together as "ephemeral streams" and regulating them similarly does not make sense to us.

2. **Lack of Clarity as to How Far Upstream.** We believe there is a lack of clarity about how far upland the Clean Water Act extends. In the case of *Smith* v. *United States Army Corps of Engineers,* No. 1 :12–CV–01282–MV–LFG, filed in the New Mexico Federal court in December of 2012, the Corps initially claimed jurisdiction over an arroyo 25 miles away from the Rio Grande. The Corps later determined that the arroyo did not have a significant nexus, and the case was settled.

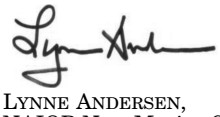
   This issue is of concern because, with New Mexico's rugged terrain, there are many arroyos and many opportunities for uncertainty.

3. **Gullies, Rills and Arroyos All Function Similarly.** It further does not make sense that "gullies and rills" are exempted from WOTUS, but arroyos are not. Functionally, each is a path of stormwater runoff . . . runoff which could reach jurisdictional water. From our research, the only difference is that "gullies and rills" (to the EPA) are paths on farm fields. We found no support in the Report for treating functionally similar stormwater paths ("gullies and rills" on the one hand and arroyos on the other) differently.

4. **Recommendation.** For the above reasons, we agree with the recommendation of our national NAIOP leadership that a more reasonable and justifiable approach is, as a matter of policy, to not regulate arid ephemeral streams. Obviously, exceptions to this policy also make sense. For example, exceptions based on history such as if ephemeral stream has been (a) proven to flow, at a rate that is more than *de minimis,* into a regulated water, for a determined number of hours (*e.g.,* 240), for a determined number of years (*e.g.,* 5 consecutive), based on historic flow, or (b) the Corps has made a case-by-case determination under the significant nexus criteria. Given the lack of justification for treating ephemeral streams differently than gullies and rills—which function similarly in transporting stormwater—please replace "*(vii) Gullies and rills and non-wetland swales*" with:

   (vii) Gullies, rills, non-wetland swales and arid ephemeral streams such as arroyos.

Sincerely yours,



LYNNE ANDERSEN,
NAIOP New Mexico Chapter *President,*
NAIOP, Commercial Real Estate Development Association.

CC: NAIOP NM Board of Directors.

HON. JEFF M. WITTE, DIRECTOR/SECRETARY, NEW MEXICO DEPARTMENT OF AGRICULTURE

November 11, 2014

DONNA DOWNING, Environmental Protection Agency,
STACEY JENSEN, U.S. Army Corps of Engineers,
Washington, D.C.

ATTN: Docket ID No. EPA–HQ–OW–2011–0880

RE: Proposed Rule—Definition of "*Waters of the United States*" Under the Clean Water Act [Docket EPA–HQ–OW–2011–0880]

Dear Ms. Downing and Ms. Jensen:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the United States Army Corps of Engineers (Corps) and Environmental Protection Agency's (EPA) (collectively "Agencies") Proposed Rule for Defini-

tion of *Waters of the United States* (*Waters of the U.S.*) under the Clean Water Act (CWA) (79 FR 22188–22274) [Docket EPA–HQ–OW–2011–0880].

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012.[1] NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

NMDA requests the withdrawal of this proposed rule due to the fact that the rule will create an undue burden on small businesses—including agricultural operations, unclear and inconsistent definitional changes, inadequate provision of supporting documentation, and poor outreach and communications prior to and during this comment period with the regulated community and state agencies. NMDA has numerous comments and requests for additional information that we would like to have addressed prior to a final rulemaking.

NMDA has been involved in researching the proposed rule, participating in numerous webinars and hearings, and staying well-informed on other associated Federal requests and actions since April of this year. NMDA has numerous comments and requests for additional information that we would like to have addressed prior to a final rulemaking. In addition to providing these extensive comments, we have also prepared a reader's guide to assist the agencies in answering our questions and concerns raised throughout the document.

NMDA's comments are organized to mirror the bright line categories of the proposed rule and our other major concerns (see Table of Contents).

Table of Contents

[1] U.S. Department of Agriculture, National Agricultural Statistics Service, "New Mexico 2012 Agricultural Statistics." Available at: *http://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/bulletin12.asp*.

Appendix B: Previously Submitted Comments

Extension of the Deadline for the Proposed Rule for Definition of "*Waters of the U.S.*" Under the Clean Water Act

Exemption from Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

Notice of Proposed Changes to the National Handbook of Conservation Practices for the Natural Resources Conservation Service

Freedom of Information Act Request to the U.S. Army Corps of Engineers

Waters of the U.S.

"For purposes of all sections of the CWA, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term '*Waters of the U.S.*' means":

Tributaries—(s)(5)

"All *tributaries* of waters identified in paragraphs (s)(1) through (3) and (5) of this section";

Though the inclusion of *tributaries* is not a new jurisdictional feature of the definition of *Waters of the U.S.,* the definitional inclusion of ditches is problematic for the Southwest's agricultural community.

Ditches

The explanation in the *Federal Register* of the proposed changes to the definition of the term *tributaries* is not clear enough to systematically discern EPA's jurisdiction over ditches. The inclusion of this category is already causing confusion for the regulated public in distinguishing jurisdictional from nonjurisdictional ditches. As such, NMDA would support an additional paragraph in the definitions section clarifying EPA's intentions regarding jurisdictional determinations over ditches separate from the language pertaining to *tributaries.*

Determining the perenniality of *tributaries* and ditches is a major component of making jurisdiction determinations for this category. The vagueness of this category and its corresponding definitions are confusing to the regulated public and should be revised for clarity.

In the Southwest many agricultural ditches connect to larger water bodies due to the lack of replenishing rainfall. According to the New Mexico Environment Department, there are about 2,727 miles of ditches and canals in New Mexico, which accounts for about 2.5 percent of the total stream miles in the state.[2] Many of these ditches may be classified as *tributaries* due to the possibility of contributions of flow to a water identified in paragraphs (s)(1) through (4). However, most of these ditches in New Mexico are not perennial and are, therefore, connected only a few months out of the year, particularly during irrigation season. NMDA requests clarification on how perenniality will be determined. Specifically, we would like to know if the public will be given the opportunity to be involved in the determination process and how conflicting determinations will be mediated.

Please see our comments regarding the term ditches in the "Exclusions" section and the new definition for the term *tributary* in the "New Definitions" section below for additional concerns regarding indirect jurisdictional assertions over *tributaries* via other nonjurisdictional waters.

Adjacent Waters—(s)(6)

"All waters, including *wetlands, adjacent* to a water identified in paragraphs (s)(1) through (5) of this section";

The definition of the term *adjacent* is embedded in several terms that concern NMDA. Please see our comments pertaining to the terms *adjacent, neighboring,* and *floodplain* within the "New Definitions" section below.

Other Waters—(s)(7)

"On a case-specific basis, *other waters,* including *wetlands,* provided that those waters alone, or in combination with other similarly situated waters, including *wetlands,* located in the same region, have a *significant nexus* to a water identified in paragraphs (s)(1) through (3) of this section."

---

[2] New Mexico Environment Department. "WQCC Draft 2014–2016 State of New Mexico CWA Section 303(d)/305(b) Integrated Report." September 9, 2014. Available at: *http://www.nmenv.statc.nm.us/swqb/303d-305b/2014-2016/*.

The inclusion of language pertaining to *other waters* has added an additional layer of complexity to this proposed rule, which goes against EPA' s stated goal of increasing clarity by the publication of this proposed rule.

The case-specific basis on which EPA will assert jurisdiction over *other waters* leaves the public unsure of the jurisdiction of waters on their land. Therefore, NMDA suggests the removal of the catch-all category—*other waters.* If the Agencies maintain the *other waters* category, we request clarification on these points described below.

Jurisdictional Determinations

The *Federal Register* notice requests comment on how better to categorize the *other waters* category. EPA has already composed a list of scientifically designated ecoregions for the State of New Mexico[3] and for the rest of the United States. This list is far more comprehensive than the proposed new list on page 22215 of the *Federal Register.* Starting the process of creating a new list of ecoregions would require a duplication of effort for no scientific purpose. Therefore, NMDA recommends using the existing ecoregions as a more robust and descriptive starting point in better categorizing the *other waters* definition.

The *Federal Register* notice of this proposed rule states, "If waters are categorized as nonjurisdictional because of lack of science available today, the Agencies request comment on how to best accommodate evolving science in the future that could indicate a significant nexus for these *other waters.* Specifically the agencies request comment as to whether this should be done through subsequent rulemaking, or through some other approach, such as through a process established in this rulemaking" (79 FR 22217). NMDA has concern over this request for information because it asks the regulated community to provide insight on ways to increase or change the jurisdictional reach of *Waters of the U.S.* in the future.

Furthermore, the "best available science" is constantly evolving. In a second draft of this rulemaking, EPA should specify areas where changes may occur in order to assist the regulated community in identifying ways this proposed rule may change in the future.

Because the catch-all category *other waters* includes case-by-case jurisdictional determinations, many stakeholders are apprehensive about the duration of these processes. Moreover, the path EPA has proposed could create substantial backlogs and force agricultural producers to postpone activities that may require a jurisdictional determination thus leading to a potential delay in agricultural production and economic losses.

In addition to the duration of the process, stakeholders are unclear of the steps involved in the jurisdictional determination and still have many questions. Will the Corps be the sole agency responsible for making determinations or will they consult with external experts? Will the process take into consideration economic activity that could be disrupted? How will stakeholders be notified if their operations occur on or near a jurisdictional water? Will stakeholders have the right to request an appeal?

To help mitigate these concerns, NMDA requests written guidance for agricultural producers that would clarify how to proactively determine if they may have jurisdictional waters on or near their owned or leased property.

The *Federal Register* notice for this proposed rule specifically states, ". . . To improve efficiencies, the EPA and Corps are working in partnership with states to develop new tools and resources that have the potential to improve precision of desk based jurisdictional determinations . . . (79 FR 22195)." As of yet, the tools mentioned in this passage are unknown to NMDA. These tools as well as those that help the regulated proactively determine jurisdiction should be made available as soon as possible. Will these tools and resources be shared with the regulated community prior to the final rule publication? Additionally, NMDA requests clarification on how these tools and resources will help stakeholders ensure their compliance.

The definition of the term *significant nexus* is of concern to NMDA. Please see our comments pertaining to the definition of this term in the "New Definitions" section below.

Exclusions from *Waters of the U.S.*—(t)

"The following are not '*Waters of the U.S.*' notwithstanding whether they meet the terms in paragraphs (s)(1) through (7) of this section."

---

[3] U.S. Environmental Protection Agency. "Ecoregions of New Mexico." Accessed September 26, 2014. *http://www.epa.gov/wed/pages/ecoregions/nm_eco.htm.*

Prior Converted Cropland—(t)(2)

> "*Prior converted cropland.* Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA."

The *Federal Register* notice for this proposed rule (in a footnote) states the Agencies use the Natural Resources Conservation Service (NRCS) definition of *prior converted cropland* for purposes of determining jurisdiction under the CWA (79 FR 22189). The NRCS defines *prior converted cropland* as farmland that was:

- "Cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as corn);
- The land was cleared, drained or otherwise manipulated to make it possible to plant a crop;
- The land has continued to be used for agricultural purposes (cropping, haying or grazing);
- And the land does not flood or pond for more than 14 days during the growing season."[4]

NMDA is highly concerned with the exclusion of *prior converted cropland,* as it is currently identified, because it relies on the NRCS's use of 1985 as the year that farmland must have been used for agricultural purposes. This creates a clear barrier to entry and is further analyzed in the subsection "Barriers to Entry" in the "Economic Analysis" section below. NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products—regardless of whether the agricultural operation was established before or after 1985.

Also, several NRCS programs, such as the Conservation Reserve Program (CRP), incentivizes agricultural producers to take land out of production:

> "In exchange for a yearly rental payment, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant species that will improve environmental health and quality. Contracts for land enrolled in CRP are 10–15 years in length. The long-term goal of the program is to re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat."[5]

Will being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production"?

Furthermore, even though the *Federal Register* notice for this proposed rulemaking claims the Agencies will use the NRCS's definition, the language of the proposed rule states the Agencies have "final authority regarding Clean Water Act jurisdiction." The Agencies have neglected to independently define *prior converted cropland,* which is contrary to logic given that EPA's claims of final authority over determining exclusions. Providing a clear definition would assist in offering consistency for the regulated public in determining if their land will be considered *prior converted cropland* thus excluded from being jurisdictional.

Upland Ditches—(t)(3)

> "Ditches that are excavated wholly in *uplands,* drain only *uplands,* and have less than perennial flow."

The exclusion requirements for ditches rests upon the term *uplands,* the definition of which is not found anywhere in the proposed rule. According to the proposed rule, ditches are excluded only if they "are excavated wholly in uplands, drain only uplands, and have less than perennial flow." EPA has the responsibility to adequately describe criteria that is pertinent to classification.

In addition to the ambiguity resulting from lack of a definition, this clause is arbitrarily stringent. In the context of irrigated agriculture, a ditch's relationship to *uplands* and its flow perenniality are not sufficient or even necessary conditions of a ditch.

How will agricultural producers know when ditches are excluded given the confusing nature of this exclusion? To provide consistency and clarity, NMDA requests

---

[4] Natural Resources Conservation Service. "Wetland Fact Sheet—Prior Converted Cropland." *http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517.*

[5] U.S. Department of Agriculture, Farm Service Agency. "Conservation Reserve Program." *http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp.*

a visual tool, perhaps in the form of a decision tree, to simplify what ditches are and are not jurisdictional.

Disconnected Ditches—(t)(4)

"Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section."

The proposed exemption is so narrow that it may not exclude many ditches. Waters may pass from a ditch through nonjurisdictional waters and still be jurisdictional according to the proposed rule's language, "[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section."

NMDA requests the removal of language that would allow for ephemeral ditches to be claimed as jurisdictional *Waters of the U.S.* We recommend striking the qualifier "or through another water," and leaving the wording, "Ditches that do not directly contribute flow to a water identified in paragraphs (s)(1) through (4) of this section."

Gullies, Rills and Non-Wetland Swales—(t)(5)(vii)

"The following features . . . (vii) Gullies and rills and non-wetland swales."

Erosional Features

The proposed rule lacks a definition for any of the terms: *gullies, rills,* or *non-wetland swales.* However, the *Federal Register* notice for this proposed rule does indicate that gullies "are ordinarily formed on valley sides and floors where no channel previously existed," indicating the relative impermanence thus variability that these erosional features contribute in flow into jurisdictional waters.

Arroyos are another type of erosional feature found throughout many western states. They are dry the vast majority of the year and are wet only immediately following a strong precipitation event. The topography in the arid West, with low-density vegetative cover and highly erodible soils, causes arroyos to form in much the same way as gullies.

Arroyos are similar to gullies in their hydrological significance. However, one main difference between the two features is that arroyos are typically wide and shallow, whereas gullies are relatively deep channels. This difference is inconsequential regarding the volume of water either can carry or contribute to a system, especially when considering the arid landscapes in which arroyos exist. In these regions, arid top soils are more prone to erosion hence erosional features tend to be wider.

NMDA requests that *arroyos* be added to this exclusion category.

Aside from *gullies, rills,* and *non-wetland swales,* how do the Agencies plan on differentiating other erosional features not specifically excluded from the definition of *Waters of the U.S.?*

Closed Basins

According to consultation with the New Mexico Environment Department, waters within closed basins do not drain into any navigable or interstate waters and have not historically been under the jurisdiction of the CWA. Instead, these waters are under state jurisdiction. In New Mexico closed basins are defined as "closed with respect to surface flow if its topography prevents the occurrence of visible outflow. It is closed hydrologically if neither surface nor underground outflow can occur."[6] Therefore, NMDA requests the addition of waters within "closed basins" to the list of exclusions presented in this proposed rule, as they cannot satisfy any criteria required for a water to be jurisdictional.

Also, the former definition of *Waters of the U.S.* includes in part (c), "All other waters such as . . . playa lakes." Will playa lakes be excluded due to their hydrologic disconnect from major waterways or are they assumed to be included under one of the new *Waters of the U.S.* categories?

New Definitions

The "Definitions" section of the proposed rule attempts to clarify several terms used in the definition of *Waters of the U.S.* However, NMDA would like the clarification and addition of several terms.

Adjacent—(u)(1)

"*Adjacent.* The term *adjacent* means bordering, contiguous or *neighboring.* Waters, including *wetlands,* separated from other *Waters of the U.S.* by man-

[6] "Glossary of Water Terms." New Mexico Office of the State Engineer. *http://www.ose.state.nm.us/water_info_glossary.html#C.*

made dikes or barriers, natural river berms, beach dunes and the like are *'adjacent waters.'*"

The qualifying separations between *Waters of the U.S.* and *adjacent* waters, including "man-made dikes or barriers, natural river berms, beach dunes, and the like," are clear. However, without guidance on the size and extent of the separations, the term *adjacent* is still unclear.

The definition of *adjacent* relies heavily on the definitions of several other key terms. Please see our comments regarding the terms *neighboring, riparian area,* and *floodplain* below for further concerns regarding the use of the term *adjacent.*

Neighboring—(u)(2)

"*Neighboring.* The term *neighboring,* for the purposes of the term *'adjacent'* in this section, includes waters located within the *riparian area* or *floodplain* of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."

EPA explicitly notes their lack of jurisdiction over groundwater in paragraph (t)(5)(vi), stating that among other features "[g]roundwater, including groundwater drained through subsurface drainage systems . . ." is not jurisdictional. However, the term *neighboring* is dependent on language that directly contradicts this exclusion.

The proposed definition for the term *neighboring* includes, "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." EPA has no jurisdiction over groundwater thus no jurisdiction over "shallow subsurface" water. We request striking the second half of the sentence, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Further, the term *shallow* in this definition is subjective and undefined by the Agencies.

Allowing waters located "within the *riparian area* or *floodplain*" creates confusion. If the floodplain is larger than a water's riparian area, will the floodplain be used as the guiding jurisdiction criteria? If so, it is not necessary to include riparian area as a jurisdictional criteria.

This new definition of *neighboring* waters relies on the definitions of the terms *riparian area* and *floodplain,* both of which have confusing definitions that in-turn make the definition of *neighboring* waters confusing. Please see our comments regarding these terms below.

Riparian Area—(u)(3)

"*Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. *Riparian areas* are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."

Again, although the CWA does not grant EPA jurisdiction over groundwater, this definition refers to groundwater using the term "subsurface hydrology." The first sentence of the paragraph states it is problematic because nonjurisdictional and, therefore, irrelevant considerations would be allowed to influence jurisdictional determinations.

We recommend striking the qualifier "or subsurface" and leaving the wording, "The term *riparian area* means an area bordering a water where surface hydrology directly influences the ecological processes and plant and animal community structure in that area."

Floodplain—(u)(4)

"*Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."

The U.S. Geological Survey defines the term *floodplain* as "a strip of relatively flat and normally dry land alongside a stream, river, or lake that is covered by water during a flood."[7] *Floodplains* are hydrologically defined by flood intervals. Flood intervals can range from 10 to 500 years yet the proposed definition does not include information about which flood interval the Agencies plan to use. This means

[7] United States Geological Survey. "Water Science Glossary of Terms." April 3, 2014. *http://water.usgs.gov/edu/dictionany.html*.

floodplains defined by the longest interval can be several times larger than the smallest; therefore, NMDA requests clarification on which interval the Agencies intend to use.

Similarly, if the designated boundaries of *floodplains* or flood zones change for any reason, the public should be notified by the Agencies how the changes will impact the jurisdictional status of waters on or near their property.

Tributary—(u)(5)

> "*Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, *wetlands,* lakes, and ponds are *tributaries* (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a *tributary* under this definition does not lose its status as a *tributary* if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as *wetlands* at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A *tributary,* including *wetlands,* can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (t)(3) or (4) of this section."

Previously, paragraph (s)(5) states that EPA will assert jurisdiction over "tributaries of waters identified in paragraphs (s)(1) through (4)." However, this paragraph depicts a much broader jurisdictional reach because of the definition of the term *tributary* in (u)(5).

Due to the qualifier "or through another water," NMDA notes that waters may pass through nonjurisdictional waters and still be classified as *tributaries.* This is because the term *another water* is not defined hence may refer to nonjurisdictional water. This is true especially when *another water* is contrasted with a "water that contributes flow directly" to a jurisdictional water.

We recommend striking the qualifier "or through another water," and leaving the wording, "The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow directly to a water identified in paragraphs (s)(1) through (4) of this section."

Significant Nexus—(u)(7)

> "*Significant nexus.* The term *significant nexus* means that water, including *wetlands,* either alone or in combination with other similarly situated waters in the region (*i.e.,* the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. *Other waters,* including *wetlands,* are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard [to] their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section."

The rule states that, "For an effect to be significant, it must be more than speculative or insubstantial." This broad definition leaves much to interpretation and should be clarified. As written, there is virtually no limit to the number of waters that could be deemed jurisdictional via *significant nexus.*

The definition of the term *significant nexus* includes a broad criterion that would allow the Agencies to claim jurisdiction over *similarly situated waters.* A *similarly situated water* "perform[s] similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section." NMDA requests the removal of language allowing for the use of *significant nexus* determinations based on proxy data like "similarly situated waters." Thus we recommend striking the qualifier "either alone or in combination with other similarly situated waters in the region" and leaving the wording, "The term *significant*

nexus means that a water, including *wetlands,* that alone significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section."

Clarity and Consistency

Other Waters

The Agencies have not been consistent in the predicted changes of jurisdiction as a result of this proposed rule. The Agencies have variously said that jurisdiction will increase,[8–9] decrease[10] and will not change.[11] NMDA cites this inconsistency as proof of the ambiguity created by the creation of the *other waters* category among other problems with the wording of this proposed rule.

The source of this confusion is that this category would require a prescribed action for every jurisdictional determination (*i.e.,* the definition requires determinations to be made on "a case-specific basis.") Currently, there is no such category that requires as extensive attention for every determination. This change would clearly result in less consistency and less clarity for waters that would belong in the new *other waters* category. One way to reduce uncertainty and increase clarity would be to provide a decision tree tool that demonstrates to the regulated public how jurisdictional determinations are made so that landowners and businesses can proactively become involved in the process.

Executive Order (E.O.) 13563, signed by President Obama in 2011, requires the regulatory system to "promote predictability and reduce uncertainty" and "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."[12] Therefore, it is important to increase clarity in actions taken by the Agencies. Currently, EPA conducts jurisdictional determinations based on the CWA itself, alongside three key Supreme Court precedents, which is confusing to the regulated public. The intention of the new definition of *Waters of the U.S.* was to increase clarity by combining the previous definition of *Waters of the U.S.* with these interpretations from the Supreme Court.

However, the language in the proposed definition, for reasons listed in sections above, may, in fact, reduce clarity and cause confusion and frustration among regulated stakeholders.

Comprehensive List of Waters

EPA has been unable to present consistent interpretations of the changes in the definitions of *Waters of the U.S.,* in spite of claims that the document's purpose is to increase clarity. To this point, the U.S. House of Representatives Committee on Science, Space, and Technology recently requested maps that show jurisdictional waters under the CWA.[13] In a response letter from EPA, Administrator Gina McCarthy states, "I wish to be clear that EPA is not aware of maps prepared by any agency, including the EPA, of waters that are currently jurisdictional under the CWA or that would be jurisdictional under the proposed rule."[14]

Because many newly proposed definitional changes rely on waters (s)(1) through (4), NMDA requests maps of these waters. From these maps stakeholders will be given the opportunity to more easily determine waters that may be included in waters (s)(5) through (7) of the proposed rule. Providing clear and thorough maps of jurisdictional waters will assist in increasing transparency, accountability, and clarity in this rulemaking.

---

[8] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*," March 2014. *http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf*.

[9] The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" May 15, 2014. Available at: *http://www.brattle.com/news-and-knowledge/publications/archive/2014*.

[10] Stoner, Nancy. "Setting the Record Straight on *Waters of the U.S.*" *EPA Connect,* July 7, 2014. *http://blog.epa.gov/epaconnect/author/nancystoner/*.

[11] U.S. Environmental Protection Agency. "Clean Water Act Exclusions and Exemptions Continue for Agriculture," *http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf*.

[12] Executive Order 13563: Improving Regulation and Regulatory Review. Signed January 18, 2011. *http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf*.

[13] Chairman Lamar Smith, U.S. House of Representatives Committee on Science, Space, and Technology. Letter to U.S. Environmental Protection Agency Administrator Gina McCarthy. Dated August 27, 2014. Available at *http://science.house.gov/epa-maps-state-2013*.

[14] Administrator Gina McCarthy, U.S. Environmental Protection Agency. Letter to Chairman Lamar Smith, U.S. House of Representatives Committee on Science, Space, and Technology. Dated July 28, 2014. Available at *http://science.house.gov/epa-maps-state-2013*.

Interpretive Rule and Other Guidance Documents

The Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404(f)(1)(A) of the CWA to Certain Agricultural Conservation Practices (Interpretive Rule) attempts to define what activities are normal agricultural activities by deferring to NRCS guidance. The interpretive rule is just the newest of a multitude of guidance documents for permitting under section 404 of the CWA. It is difficult, if not impossible, for interested public parties to know of the existence of these documents. Therefore, it would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rules in one place.

NRCS guidelines are subject to review, and parties with an interest in the CWA may not be aware of these changes or their potential impacts on their agricultural operations. NMDA requests the Agencies publish a *Federal Register* notice when NRCS guidelines are up for review. This notice should indicate that changes in NRCS guidelines will impact agricultural producers due to the applicability of permitting under the CWA, which would not have been necessary prior to changes in NRCS guidelines. We have requested the same of the NRCS when they make changes to their *National Handbook of Conservation Practices.*[15]

Please see our previously submitted comments on the Agricultural Interpretive Rule and the NRCS *National Handbook of Conservation Practices* in *Appendix B* for further concerns regarding this document.

Land Use

Though the Agencies have assured the public on numerous occasions that this rule does not impact land use, it does impact activities that can be done near ephemeral water bodies that may not have been jurisdictional prior to this rulemaking. This rule will have an impact on land use, particularly in areas in the arid West. According to the New Mexico Environment Department and the New Mexico Water Quality Control Commission, there are 108,649 miles of streams of which 99,332 miles are intermittent or ephemeral. That means that over 91 percent of all streams in New Mexico have the potential to be determined *Waters of the U.S.* despite the fact that they are dry most of the year.[16] Therefore, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of *Waters of the U.S.*

Public Involvement

Outreach

EPA has claimed extensive outreach to state and local agencies before the development of the proposed rule.[17] For instance, the *Federal Register* states, ". . . EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council, and the Association of State Wetland Managers participated in various calls and meetings" (79 FR 22221). NMDA has been party to conversations with multiple state and local agencies throughout the West—including the Wyoming Department of Agriculture, Utah Department of Agriculture and Food, Idaho State Department of Agriculture, Colorado Department of Agriculture, and New Mexico Environment Department—and has been unable to locate even a single one indicating outreach from EPA If public records of this outreach exist, NMDA requests this information be published.

---

[15] Natural Resources Conservation Service. "Conservation Practices." *http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/references/?cid=nrcs143_026849.*

[16] New Mexico Environment Department. "WQCC Draft 2014–2016 State of New Mexico CWA Section 303(d)/305(b) Integrated Report." September 9, 2014. Available at: *http://www.nmenv.state.nm.us/swqb/303d-305b/2014-2016/.*

[17] U.S. Environmental Protection Agency. "EPA Summary of the Discretional Small Entity Outreach for Planned Proposed Revised Definition of '*Waters of the U.S.*'" Available at: *http://www2.epa.gov/uswaters/epa-summary-discretionary-small-entity-outreach-planncd-proposed-revised-definition-waters.*

During telephone conversations and webinars EPA and the Corps hosted after the publication of the proposed rule, EPA has maintained a defensive tone.[18–19] Rather than either address concerns raised by the public or state that comments would be taken seriously in the revision of the proposed rule, the Agencies merely restated that the intent of the rule is to increase clarity. NMDA maintains that stakeholders with concerns do, in fact, understand the implications of this rule and implores that EPA consider the concerns brought up by this and other state and local agencies and revise the proposed rule accordingly.

Concerns from Congress

The fact that several United States legislative bills (including S. 2496: "Protecting Water and Property Rights Act of 2014,"[20] S. 2613: "Secret Science Reform Act of 2014,"[21] H.R. 5071: "Agricultural Conservation Flexibility Act of 2014,"[22] and H.R. 5078: "*Waters of the U.S.* Regulatory Overreach Protection Act of 2014"[23]) have been filed at the Federal legislative level that requests the withdrawal or revision of the proposed rule indicates there are major problems with this proposed rule-making as presented. Several bipartisan letters from United States Senators and Representatives have also been submitted requesting clarification of the proposed rule. This includes a letter signed by 13 Senators who have specific concerns about the proposed rule's impact on the agricultural community.[24]

Document Availability

Draft Environmental Assessment (DEA)

Despite reference to a DEA prepared by the Corps for section 404 aspects of the proposed rule on page 22222 in the *Federal Register* notice, NMDA has not been able to locate this National Environmental Policy Act documentation.

Such an important document should have been made publicly available on the EPA's *Waters of the U.S.* website. NMDA submitted a Freedom of Information Act (FOIA) request on October 27, 2014, for these documents. This FOIA request can be found in *Appendix B.*

Connectivity Report

The EPA's Office of Research and Development's report entitled, "Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence (Connectivity Report)," the document, upon which all of these definitional changes are based, was not complete at the time of publication of the proposed definitional changes. The Agencies state throughout the *Federal Register* notice for this proposed rule that the final rule for the definition of *Waters of the U.S.* will not be finalized until the Connectivity Report is finalized (79 FR 22188–22274).

Meanwhile, the EPA's Scientific Advisory Board (SAB) was tasked with reviewing the Connectivity Report for the "clarity and technical accuracy of the report, whether it includes the most relevant peer-reviewed literature; whether the literature has been correctly summarized; and whether the findings and conclusions are supported by the available science."[25] The SAB completed their review of the Connectivity Re-

---

[18] University of Nebraska Livestock and Poultry Environmental Learning Center. "*Waters of the U.S.* Proposed Rule Webinar." Hosted 6/20/14. Archived at: *http://www.extension.org/pages/71028/epas-proposcd-waters-of-the-us-regulations#.VC8F7xYa5F8.*

[19] U.S. Environmental Protection Agency. "*Waters of the U.S.:* Clarifying Misconceptions." Hosted 7/16/14. *http://www.2.epa.gov/uswaters/waters-united-states-webinar-clarifying-misconceptions.*

[20] Protecting Water and Property Rights Act of 2014, S. 2496, 113 Cong. Sponsored by Sen. John Barrasso (WY). Introduced June 19, 2014. Available at: *https://www.congress.gov/bill/113th-congress/senate-bill/2496/text.*

[21] Secret Science Reform Act of 2014, S. 2613, 113 Cong. Sponsored by Sen. John Barrasso (WY). Introduced July 16, 2014. Available at: *https://www.congress.gov/bill/113th-congress/senate-bill/2613.*

[22] Agricultural Conservation Flexibility Act of 2014, H.R. 5071, 113 Cong. Sponsored by Rep. Reid Ribble (WI). Introduced July 10, 2014. Available at: *https://www.congress.gov/bill/113th-congress/house-bill/5071.*

[23] *Waters of the U.S.* Regulatory Overreach Protection Act of 2014, H.R. 5078, 113 Cong. Sponsored by Rep. Steve Southerland II (FL). Introduced July 11, 2014. Available at: *https://www.congress.gov/bill/113th-congress/house-bill/5078.*

[24] United States Senate. Letter to U.S. Environmental Protection Agency Administrator Gina McCarthy, U.S. Department of the Army Secretary John McHugh, and U.S. Department of Agriculture Secretary Thomas Vilsack. Dated July 31, 2014. Available at: *http://sustainableagriculture.net/blog/senate-wotus-letter/.*

[25] U.S. Environmental Protection Agency Office of the Administrator Scientific Advisory Board. "SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." October 17, 2014. Available

Continued

port on October 17, 2014, and had substantial recommendations for improvement and further scientific analysis.

For instance, the SAB report notes technical inaccuracies in the underlying science upon which this proposed rule is based:

- "The Report often refers to connectivity as though it is a binary property rather than as a gradient. In order to make the Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach . . ."
- "The SAB recommends that the EPA consider expanding the brief overview of approaches to measuring connectivity."
- "The SAB recommends that the Report more explicitly address the scientific literature on cumulative and aggregate effects of streams, groundwater systems, and wetlands on downstream waters."

These technical limitations affect the final outcome of jurisdictional determinations for all of the categories of *Waters of the U.S.*

EPA has the responsibility to provide finalized and complete documentation to the public, especially when other important Federal actions hinge on the outcome of that documentation. Any changes in the Connectivity Report, which is still not finalized, could seriously hamper and even invalidate the language proposed in this rule by effectively barring public participation. Further, the scientific reasoning for the definitional changes to *Waters of the U.S.* needs improvement. NMDA requests the agencies withdraw this proposed rule and reinitiate a comment period at the time the Connectivity Report is finalized.

Stakeholders and the public in general have the right to understand the full implications that regulatory changes will have on their operations before Federal regulations are proposed. Please see our previously submitted comments on this rule pertaining to deadline incongruence resulting from the Connectivity Report still being in draft form. These comments can be found in *Appendix B* for further concerns regarding this document.

Second Draft of the Proposed Rule

Because of the sheer quantity of requests for public input in the F*ederal Register* notice for this proposed rule, a single draft for this proposed rule will not be sufficient. The Agencies have requested too much information from the public, and the potential for unintended consequences is high when taking into consideration every potential change to the rule resulting from public comments.

If the proposed rule is not withdrawn entirely, NMDA supports the publication of a second draft, listing the comments received and detailing EPA's responses to them. This will greatly increase transparency of the rulemaking process.

Economic Analysis

Analytical Errors

The Agencies prepared a report entitled, "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.* (Economic Analysis)." The Economic Analysis describes the costs and benefits of the proposed rule; however, the Agencies make several economic benefit claims that are based on data that is not available to the public. The benefit claims are based on the previous *Waters of the U.S.* definition, which are not the same as those in the proposed rule.

Also, using 2009–2010 as the baseline, economic study year could be unrepresentative of a long-term economic comparison due to the overall national economic downturn during that time.[26] Similarly, drawing major conclusions from information in 1 year is not reflective of long-term implications this rulemaking may have. The Agencies have claimed the proposed rule does not affect areas that were previously excluded from jurisdiction, that the proposed rule does not regulate new

---

at: *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershedperecnt20Connectivitypercent20Report!OpenDocument&TableRow=2.3#2*.

[26] U.S. Environmental Protection Agency & U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" March 2014. Available at: *http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act*.

types of waters.[27] If this is the case, why are there several new definitions and an Agency estimated 2.7 percent increase in acreage?[28]

The Brattle Group, an independent economic, regulatory, and financial consulting firm, prepared a report for the Waters Advocacy Coalition entitled, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.* (Brattle Group Report)."[29] The Waters Advocacy Coalition "is an inter-industry coalition representing the nation's construction, real estate, mining, agriculture, forestry, manufacturing, energy sectors, and wildlife conservation interests."[30] The Brattle Group Report is a very detailed analysis of the Agencies' Economic Analysis and identifies numerous errors including "flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definition changes . . ."[31] The report suggests that the Agencies "should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA."[32]

Due to the analytical errors described above and the issues identified in the "Benefits," "Costs," and "Barriers to Entry" sections below, NMDA requests a more accurate and complete analysis of the economic implications of this proposed rulemaking.

Benefits

EPA's claims that benefits resulting from this proposed rule outweigh the costs are not entirely relevant. Agriculture and industry bear the huge majority of costs, whereas the benefits listed by EPA are mostly nonhuman and environmental.[33] These environmental benefits, termed *ecosystem services,* are purported to improve water quantity even though the primary concern of the CWA is water quality. One of NMDA's concerns is that the conflation between water quality and quantity in this regard has led to an overestimation of the benefits and that costs to the agricultural community have been minimized.

The *ecosystem services* taken from the Economic Analysis include: "flood storage & conveyance, support for commercial fisheries, water input and land productivity for agriculture and commercial & industrial production, municipal and water supply, recreation & aesthetics, sediment and contaminant filtering, nutrient cycling, groundwater recharge, shoreline stabilization and erosion prevention, biodiversity, wildlife habitat (emphasis added)." NMDA requests an explanation of the benefits listed above, especially those related to water quantity benefits.

Costs

EPA does not take into consideration the costs on agricultural sectors that do not qualify for the Agricultural 404(f)(1)(A) Exemption. An increase in jurisdiction would likely entail an increase in requirements for National Pollutant Discharge Elimination System (NPDES) permitting. Agriculture-related permits primarily affected by this potential permitting increase would be Concentrated Animal Feeding Operations (such as dairies) and Pesticide General Permits.[34] Again, NMDA requests a thorough analysis on the costs this rule will have on various regulated industries.

Barriers to Entry

As previously detailed, the NRCS defines prior converted cropland as farmland that was "cropped prior to December 23, 1985, with an agricultural commodity (an

---

[27] U.S. Environmental Protection Agency. "Fact Sheet: How the Proposed *Waters of the U.S.* Rule Benefits Agriculture." Available at: *http://www2.epa.gov/uswaters/fact-sheet-how-proposed-waters-us-rule-benefits-agriculture*.

[28] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*," March 2014. *http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf*.

[29] The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" May 15, 2014. Available at: *http://www.brattle.com/news-and-knowledge/publications/archive/2014*.

[30] U.S. Chamber of Commerce. "Waters Advocacy Coalition (WAC) Letter on Definition of *Waters of the U.S.*" June 10, 2014. *https://www.uschamber.com/letter/waters-advocacy-coalition-wac-letter-definition-waters-us*.

[31] The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 2. May 15, 2014. Available at: *http://www.brattle.com/news-and-knowledge/publications/archive/2014*.

[32] The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 2. May 15, 2014. Available at: *http://www.brattle.com/news-and-knowledge/publications/archive/2014*.

[33] U.S. Environmental Protection Agency. "Ditch the Myth." September 26, 2014. *http://www2.epa.gov/uswaters/ditch-myth*.

[34] New Mexico Environment Department, Surface Water Quality Bureau. "NPDES Permits in New Mexico." *http://www.nmenv.state.nm.us/swqb/Permits/*.

annually tilled crop such as corn); the land was cleared, drained, or otherwise manipulated to make it possible to plant a crop; the land has continued to be used for agricultural purposes (cropping, haying, or grazing); and the land does not flood or pond for more than 14 days during the growing season."[35]

The explicit exclusion for "prior converted croplands" will create a barrier to entry for agricultural producers due to the NRCS cutoff date of 1985. Younger agriculturalists wanting to start their own operations will not be afforded the same opportunities as older, more established farmers or ranchers. The average age of agricultural producers in the United States is 58 years old;[36] implementing arbitrary requirements may prevent new farmers from entering the market. This barrier could have profound impacts on rural economies in addition to the nation's ability to provide enough agricultural goods for a growing population.

It is also contrary to many policies of the United States Department of Agriculture, which aim to provide incentives to young people to get involved in agriculture and could jeopardize the future of farming.

Similarly, in reference to the "continuous operation" provision, NMDA requests clarification on whether land use restrictions near a newly designated *Waters of the U.S.* will change when agricultural lands are either sold or passed from one generation to the next when the use for the land is maintained as agricultural. If restrictions are put into place or if major permitting would be required with new ownership, it would create a barrier to entry for new agricultural producers, especially since it is not uncommon for agriculture operations to be passed on from one generation to the next.

Federalism (E.O. 13132) and Costs to State and Local Agencies

> "This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, Executive Order 13132 does not apply to this action and local agencies should have been done at that level as well (79 FR 22220)."

Since "[t]he main responsibility for water quality management resides with the states in the implementation of water quality standards, the administration of the NPDES . . . and the management of non-point sources of pollution,"[37] any change in jurisdiction will necessarily have an impact on the states. E.O. 13132 states that, "To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on state and local governments, and that is not required by statute . . ."[38] NMDA concludes that the Agencies' analysis regarding E.O. 13132 was done incorrectly.

The Economic Analysis states there should be no substantial increase in costs to state agencies, in spite of a probable increase in jurisdiction. Under the section entitled "CWA Section 303 and 305," the document states, "EPA's position on these costs is that an expanded assertion of jurisdiction would not have an effect on annual expenditures . . . for state agencies, including those responsible for state water quality standards, monitoring and assessment of water quality, and development of total maximum daily loads (TMDLs) for impaired waters."

NMDA does not agree that states will necessarily have capability in a form robust enough to comply with the expanded Federal jurisdiction as proposed in this rule. Moreover, monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs.

Environmental Justice (E.O. 12898), the Regulatory Flexibility Act (RFA), and Impacts to Small Businesses

In the *Federal Register* notice of this proposed rulemaking, EPA claims that under the RFA the proposed rule will have no effect on small business using the language, "After considering the economic impacts of this proposed rule on small entities, I certify that this proposed rule will not have a significant economic impact on a sub-

---

[35] Natural Resources Conservation Service. "Wetland Fact Sheet—Prior Converted Cropland." *http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517*.

[36] U.S. Department of Agriculture. "2012 Census of Agriculture." *http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1._Chapter_1_US/*.

[37] U.S. Environmental Protection Agency. "Overview of Impaired Waters and Total Maximum Daily Loads Program." *http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm#section303*.

[38] Exec. Order No. 13132—"Federalism." Signed August 4, 1999. Available at: *https://www.federalregister.gov/articles/1999/08/10/99-20729/federalism*.

stantial number of small entities" (79 FR 22220). However, language pulled directly from the Economic Analysis states, "As a result of this proposed action, costs to regulated entities will likely increase for permit application expenses."[39] The same document says, "This proposed rule could result in new indirect costs on regulated entities such as the energy, agricultural, and transportation industries; land developers, municipalities, industrial operations; and on governments administering regulatory programs, at the tribal, state and Federal levels."[40] The *Federal Register* notice and the Economic Analysis conclusions clearly contradict each other; and NMDA agrees with the latter, that increased permitting will come with increased costs to small businesses.

NMDA requests that additional analysis be completed to determine the true impacts of increased permitting to small businesses—particularly for the agriculture industries. In the meantime, USDA's 2012 Census of Agriculture provides economic analyses that show a significant amount of agricultural producers can be categorized as small businesses thus likely to experience the impact of regulatory burden. The 2012 Census of Agriculture classifies approximately 75 percent of agricultural operations nationwide as being less than $50,000 in the "classification of farms by the sum of market value of agricultural products sold and Federal farm program payments."[41] In New Mexico the percentage of less than $50,000 producers is significantly higher, at nearly 88 percent; therefore, producers in New Mexico could be more economically vulnerable to market fluctuations caused by regulatory burden. NPDES and other permitting costs may have a negative economic impact on small businesses. Therefore, EPA's findings under RFA are not only incorrect but they also conflict with supporting documents.

To this same point, the United States Small Business Administration recently wrote a comment letter to the Agencies requesting them to "withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[42]

Conclusion

For reasons stated throughout our comments, NMDA requests the withdrawal of this proposed rule since the rule will create an undue burden on small businesses—including agricultural operations, unclear and inconsistent definitional changes, inadequate provision of supporting documentation, and poor outreach and communications prior to and during this comment period with the regulated community and state agencies.

Thank you for the opportunity to comment on the Proposed Rule for Definition of *Waters of the U.S.* Under the Clean Water Act. We request the opportunity to be involved in any revisions of the proposed rule and other involvement opportunities. NMDA also requests to be included in any updates or mailing lists associated with this Proposed Rule.

If clarification of any comments is needed, please contact Mr. Ryan Ward at (575) 646–2670 or Ms. Lacy Levine at (575) 646–8024.

Sincerely,

Hon. JEFF M. WITTE.

Appendix A: NMDA Comments—Reader's Guide

Throughout this document, NMDA has requested information from the Agencies to either provide additional clarity or documentation on certain issues. The following is a list of the questions and requests for information excerpted from our comments. This list does not reflect the full scope of our comments, rather it is meant to serve as a reference for addressing specific questions and concerns. We request the Agen-

---

[39] U.S. Environmental Protection Agency & U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 32. March 2014. Available at: *http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act*.

[40] U.S. Environmental Protection Agency & U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 5. March 2014. Available at: *http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act*.

[41] U.S. Department of Agriculture—National Agricultural Statistics Service, "2012 Census of Agriculture." 2014. *http://www.agcensus.usda.gov/Publications/2012/*.

[42] U.S. Small Business Administration, Comments on the Definition of "*Waters of the U.S.*" Under the Clean Water Act. Submitted 10/1/14. *http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act*.

cies review the entirety of our comments and use the following highlights from our comments as a guide.

Tributaries (s)(5), Ditches*

- NMDA would support an additional paragraph in the definitions section clarifying EPA's intentions regarding jurisdictional determinations over ditches separate from the language pertaining to *tributaries.*
- NMDA requests clarification on how perenniality will be determined. Specifically, we would like to know if the public will be given the opportunity to be involved in the determination process and how conflicting determinations will be mediated.

Other Waters (s)(7)

NMDA suggests the removal of the catch-all category—*other waters.* If the Agencies retain the *other waters* category, we request clarification on the points described below.

- NMDA recommends using the existing ecoregions as a more robust and descriptive starting point in better categorizing the *other waters* definition.
- In a second draft of this rulemaking, EPA should specify areas where changes may occur in order to assist the regulated community in identifying ways this proposed rule may change in the future.
- In addition to the duration of the process, stakeholders are unclear of the steps involved in the jurisdictional determination and still have many questions. Will the Corps be the sole agency responsible for making determinations or will they consult with external experts? Will the process take into consideration economic activity that could be disrupted? How will stakeholders be notified if their operations occur on or near a jurisdictional water? Will stakeholders have the right to request an appeal?
- NMDA requests written guidance for agricultural producers that would clarify how to proactively determine if they may have jurisdictional waters on or near their owned or leased property.
- "New tools and resources that have the potential to improve precision of desk based jurisdictional determinations" should be provided to the regulated community to assist in independently assessing if water bodies on their land will be jurisdictional and to begin taking appropriate action to maintain compliance with Agency standards.

Exclusions from *Waters of the U.S.* (t)

Prior Converted Cropland (t)(2)

- NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products—regardless of whether the agricultural operation was established before or after 1985.
- "Will being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production"?
- Providing a clear, Agency-endorsed definition of prior converted cropland would assist in offering consistency for the regulated public in determining if their land will be considered prior converted cropland thus excluded from being jurisdictional.

Upland Ditches (t)(3)

- NMDA requests the term uplands be defined in the *Waters of the U.S.* rule.
- How will agricultural producers know when ditches are excluded given the confusing nature of this exclusion? To provide consistency and clarity, NMDA requests a visual tool, perhaps in the form of a decision tree, to simplify what ditches are and are not jurisdictional.

Disconnected Ditches (t)(4)

- Waters may pass from a ditch through nonjurisdictional waters and still be jurisdictional according to the proposed rule's language. NMDA requests the removal of language that would allow for ephemeral ditches to be claimed as jurisdictional and striking the qualifier "or through another water."

---

*__Editor's note:__ The document as originally submitted contained page references for each section; ***however,*** they are omitted in this typeset reprinting.

Gullies, Rills, and Non-Wetland Swales (t)(5)(vii)

- NMDA requests that arroyos be added to this exclusion category.
- Aside from gullies, rills, and non-wetland swales, how do the Agencies plan on differentiating other erosional features not specifically excluded from the definition of *Waters of the U.S.?*

Closed Basins

- NMDA requests the addition of waters within "closed basins" to the list of exclusions presented in this proposed rule, as they cannot satisfy any criteria required for a water to be jurisdictional.
- Will playa lakes be excluded due to their hydrologic disconnect from major waterways or are they assumed to be included under one of the new *Waters of the U.S.* categories?

New Definitions

Adjacent (u)(1)

- The qualifying separations between *Waters of the U.S.* and adjacent waters, including "man-made dikes or barriers, natural river berms, beach dunes, and the like," are clear. However, without guidance on the size and extent of the separations, the term adjacent is still unclear.

Neighboring (u)(2)

- EPA has no jurisdiction over groundwater thus no jurisdiction over "shallow subsurface" water. We request striking the second half of the sentence, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Further, the term shallow in this definition is subjective and undefined by the Agencies.
- If the floodplain is larger than a water's riparian area, will the floodplain be used as the guiding jurisdiction criteria?

Riparian Area (u)(3)

- We recommend striking the qualifier "or subsurface" due to the fact that groundwater is not jurisdictional.

Floodplain (u)(4)

- Flood intervals can range from 10 to 500 years yet the proposed definition does not include information about which flood interval the Agencies plan to use.

Tributary (u)(5)

- Due to the qualifier "or through another water," NMDA notes that waters may pass through nonjurisdictional waters and still be classified as tributaries. This qualifier should be removed from the definition.

Significant Nexus (u)(7)

- The rule states that, "For an effect to be significant, it must be more than speculative or insubstantial." This broad definition leaves much to interpretation and should be clarified.
- NMDA requests the removal of language allowing for the use of significant nexus determinations based on proxy data like "similarly situated waters." Please remove the phrase "similarly situated waters" from the definition.

Clarity and Consistency

Other Waters

- Including the category "Other Waters" does not increase clarity for the regulated public. One way to reduce uncertainty and increase clarity would be to provide a decision tree tool that demonstrates to the regulated public how jurisdictional determinations are made so that landowners and businesses can proactively become involved in the process.

Comprehensive List of Waters

- Because many newly proposed definitional changes rely on waters (s)(1) through (4), NMDA requests maps of these waters. From these maps stakeholders will be given the opportunity to more easily determine waters that may be included in waters (s)(5) through (7) of the proposed rule.

Interpretive Rule and Other Guidance Documents

- It would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and

other stakeholders to access all relevant information about the implementation of this and related rules in one place.

- NMDA requests the Agencies publish a *Federal Register* notice when NRCS guidelines are up for review due to the fact that changes in the NRCS guidelines will affect compliance with the Clean Water Act for certain agricultural practices.

Land Use

- Due to the fact that over 91 percent of all streams in New Mexico have the potential to be determined *Waters of the U.S.* despite the fact that they are dry most of the year, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of *Waters of the U.S.*

Public Involvement

Outreach

- NMDA requests that a thorough description of the claimed outreach activities to stakeholders be published.

Document Availability

- The DEA prepared by the Corps for section 404 aspects of the proposed rule should be published on the EPA's website due to its importance in the rulemaking process.
- The SAB completed their review of the Connectivity Report on October 17, 2014, and had substantial recommendations for improvement and further scientific analysis. These recommendations should be incorporated into the Connectivity Report and resulting changes to the definition of *Waters of the U.S.* should be made available for public comment in the form of a second draft of the proposed rule.
- If the proposed rule is not withdrawn entirely, NMDA requests the publication of a second draft listing the comments received and detailing EPA's responses to them.

Economic Analysis

Analytical Errors

- NMDA requests a more accurate and complete analysis of the economic implications of this proposed rulemaking for the following reasons: the Agencies make several economic benefit claims that are based on data that is not available to the public; the benefit claims are based on the previous *Waters of the U.S.* definition, which are not the same as those in the proposed rule; and using 2009–2010 as the baseline economic study year could be unrepresentative of a long-term economic comparison.

Benefits

- NMDA requests an explanation of the economic benefits, especially those related to the improvement of water quantity even though the primary concern of the CWA is water quality.

Costs

- NMDA requests a thorough analysis on the costs this rule will have on various regulated industries, especially those related to agricultural sectors that do not qualify for the Agricultural 404(f)(1)(A) Exemption.

Barriers to Entry

- The explicit exclusion for "prior converted croplands" will create a barrier to entry for agricultural producers due to the NRCS cutoff date of 1985. Younger agriculturalists wanting to start their own operations will not be afforded the same opportunities as older, more established farmers or ranchers.
- In reference to the "continuous operation" provision, NMDA requests clarification on whether land use restrictions near a newly designated *Waters of the U.S.* will change when agricultural lands are either sold or passed from one generation to the next when the use for the land is maintained as agricultural.

Federalism (E.O. 13132) and Costs to State and Local Agencies

- NMDA does not agree that states will necessarily have capability in a form robust enough to comply with the expanded Federal jurisdiction as proposed in this rule. Moreover, monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily

require additional resources and, therefore, cannot possibly come without new costs.

Environmental Justice (E.O. 12898), the Regulatory Flexibility Act (RFA), and Impacts to Small Businesses

- The *Federal Register* notice and the Economic Analysis conclusions clearly contradict each other; and NMDA agrees with the latter, that increased permitting will come with increased costs to small businesses. NMDA requests that additional analysis be completed to determine the true impacts of increased permitting to small businesses—particularly for the agriculture industries.

Appendix B: Previously Submitted Comments

Extension of the Deadline for the Proposed Rule for Definition of "*Waters of the U.S.*" Under the Clean Water Act

May 7, 2014

DONNA DOWNING, Environmental Protection Agency,
STACEY JENSEN, U.S. Army Corps of Engineers,
Environmental Protection Agency,
Washington, D.C.

ATTN: Docket ID No. EPA–HQ–OW–2011–0880
RE: Proposed Rule—Definition of "*Waters of the U.S.*" Under the Clean Water Act [Docket EPA–HQ–OW–2011–0880]

Dear Ms. Downing and Ms. Jensen:

New Mexico Department of Agriculture (NMDA) submits the following initial comments in response to the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency's (EPA) (collectively "the Agencies") Proposed Rule for Definition of "*Waters of the U.S.*" Under the Clean Water Act (79 FR 22188–22274) [Docket EPA–HQ–OW–2011–0880].

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics, 2012). NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

Peer-Reviewed Literature

The proposed rule will substantially impact the agricultural community and their practices. Our preliminary concern is that the rule continually references a report (Report) that is not yet finalized, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence."

The draft rule states: "The Report is under review by EPA's Science Advisory Board, and the rule will not be finalized until that review and the final Report are complete." While we agree the rule should not be finalized until the Report is complete, we do not agree that the draft rule should reference the Report in its current iteration—especially because of the explicit warning printed on every page "DRAFT—DO NOT CITE OR QUOTE."

Our recommendation is that the peer-reviewed literature be finalized by addressing and incorporating public comments before the EPA uses it to endorse other Federal actions. Any major changes to the Proposed Rule as a result of findings from the Report should be addressed in a second draft of the Proposed Rule (argued further below).

Additional Commenting Opportunity

Within the proposed rule, the agencies provide opportunity to the public to comment on options for aspects of the proposed rule—especially with regard to choosing how to address *other waters.* NMDA requests agencies make a second draft of the Proposed Rule available to the public to comment after final regulatory decisions on *other waters* and any other water categories are made. With so many decisions still unclear, the public deserves the right to comment on the proposed rule once the different options are narrowed.

Extending Comment Period

NMDA recommends the EPA suspend the current comment period and reopen it when the Report is finalized, giving 90 days for input from that point. This would afford stakeholders the opportunity to review documents in their finalized forms and in chronological order of dependence.

Conclusion

Thank you for the opportunity to comment on the Proposed Rule for Definition of "*Waters of the U.S.*" Under the Clean Water Act. NMDA requests to be included in any updates or mailing lists associated with this Proposed Rule. If clarification of any comments is needed, please contact Mr. Ryan Ward at (575) 646–2670 or Ms. Lacy Levine at (575) 646–8024.

Sincerely,

Hon. JEFF M. WITTE.

Exemption from Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

July 2, 2014

DAMARIS CHRISTENSEN,
Office of Water,
Environmental Protection Agency,
Washington, D.C.;

STACEY JENSEN,
Regulatory Community of Practice,
U.S. Army Corps of Engineers,
Washington, D.C.;

CHIP SMITH,
Office of the Deputy Assistant Secretary of the Army,
Department of the Army,
Washington, D.C.

RE: Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices [*Docket EPA–HQ–OW–2013–0820; 9908–97–OW*]

Dear Ms. Christensen, Ms. Jensen, and Mr. Smith:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the United States Army Corps of Engineers (Corps), Department of the Army (DOA), and Environmental Protection Agency's (EPA) (collectively "the Agencies") Notice of Availability (NOA) Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act (CWA) to Certain Agricultural Conservation Practices (79 FR 22276) [*Docket EPA–HQ–OW–2013–0820; 9908–97–OW*].

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics, 2012). NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

Although the interpretative rule was enacted without prior public comment, NMDA has reviewed the rule and has several concerns about its impact on the future of agriculture in the United States and New Mexico in particular. NMDA has concerns that this rule will be a detriment to agriculture when it is considered in conjunction with the expanded definition of "*waters of the U.S.*" currently open for public comment.

The interpretative rule states that a farmer enacting one of the conservation practices approved under the interpretive rule does not have to have prior approval from the Corps nor the EPA, but the farmer must comply with National Resources Conservation Service (NRCS) technical standards. The rule does not make it clear which agency will ensure that farming practices are in compliance nor what would happen if a farmer unknowingly is not in compliance. NMDA has strong concerns that farmers and ranchers would be open to citizen lawsuits under the Clean Water Act if they are unknowingly not in compliance with the NRCS standard. The interpretative rule seems to leave farmers and ranchers open to more regulatory uncertainty.

If this interpretative rule intends to make NRCS the enforcers of compliance, we fear an erosion of a strong and beneficial relationship between farmers and NRCS. Currently, NRCS provides technical guidance on a wide range of farming practices. As was stated by NRCS field personnel at a recent meeting in New Mexico, their job is to assist farmers. NRCS field personnel have not traditionally had a regulatory or policing role, rather they have helped farmers solve technical problems, improve farming practices, and access resources of the United States Department of

Agriculture (USDA). All of this provides benefits to farmers, the natural resources upon which farming and the nation depend. Most importantly, the nation's food security depends on a continued supply of safe and fresh foods.

We are also concerned that NRCS will no longer be in sole control of the conservation practices they develop. The last paragraph of the interpretative rule seems to indicate that EPA and the Corps will have significant input, and perhaps veto power, over the conservation practices. NRCS has a long history of on-the-ground work with farmers and ranchers. They understand the challenges and practices of farming and ranching. The business of NRCS is helping farmers and ranchers with the implementation of on-the-ground conservation practices. We are concerned that two agencies (EPA and Corps) that do not have agronomists, horticulturists, nor range scientists on staff will be directing how farming and ranching activities are done. Development and modification of conservation practices should remain within the purview of the experts at NRCS.

Additionally, the interpretative rule states that exempted conservation practices will be reviewed on an annual basis. The implementation of conservation practices involves multi-year projects; and NMDA is concerned that a farmer who has enacted or is in the process of enacting a practice will suddenly be left in a state of regulatory uncertainty if that practice is removed from the approved list. A process for dealing with this situation should be added to the rule. Ideally, this farmer would be grandfathered into the exemption from permitting.

Last, the increasing average age of farmers and ranchers in the country and the lack of recruitment of younger individuals into farming is a looming concern of both the USDA and NMDA. The interpretative rule states that only practices performed on an "established (*i.e.,* ongoing) farming, silviculture, or ranching operation" are eligible for exemption. This is contrary to many policies of the USDA, which aim to provide incentives to young people to get involved in agriculture, and could jeopardize the future of farming.

Farming and ranching operations in New Mexico are almost entirely small, family-owned businesses. We request that EPA, Corps, and NRCS reevaluate the interpretative rule and the agricultural exemptions under the Clean Water Act to ensure that farming and ranching have a future in New Mexico and the United States. As the world population continues to grow and the number of people who face food security challenges increases in this country and elsewhere, the United States must ensure that agriculture continues to have the ability to produce a food supply that can meet these mounting demands.

Thank you for the opportunity to comment on this NOA Regarding the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act (CWA) to Certain Agricultural Conservation Practices. NMDA requests to be included in any updates or mailing lists associated with the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act (CWA) to Certain Agricultural Conservation Practices.

If clarification of any comments is needed, contact Ms. Angela Brannigan at (575) 646–8025 or Ms. Lacy Levine at (575) 646–8024.

Sincerely,

Hon. JEFF M. WITTE.

Works Cited

New Mexico Agricultural Statistics—2012. Available at: *http://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/bulletin_12.asp*.

Notice of Proposed Changes to the *National Handbook of Conservation Practices* for the Natural Resources Conservation Service

August 28, 2014

ATTN: Regulatory and Agency Policy Team

WAYNE BOGOVICH,
Strategic Planning and Accountability,
Natural Resources Conservation Service,
Beltsville, MD.

RE: Notice of Availability: Notice of Proposed Changes to the *National Handbook of Conservation Practices* for the Natural Resources Conservation Service (*Docket No. NRCS–2014–0009; 79 FR 48723–48725*)

Dear Mr. Bogovich:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the Natural Resources Conservation Service's (NRCS) Notice of Availability of Proposed Changes to the *National Handbook of Conservation Practices* (Handbook) (*Docket No. NRCS–2014–0009; 79 FR 48723–48725*).

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries as well as to analyze those actions by Federal and state agencies that may affect its viability. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics, 2012). NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

NMDA has no comments regarding the specific proposed changes to the Handbook except that many of them are well received and appreciated. However, we have a few comments regarding any future proposed changes to the Handbook.

First, several of the Conservation Practice Standards that NRCS is proposing changes to are also Agricultural Conservation Practice Standards, which are exempt from 404(f)(1)(A) permitting under the Environmental Protection Agency's Clean Water Act (CWA) (79 FR 22276). In the future, it would be helpful to agricultural producers to include some reference to the CWA's Agricultural Conservation Practice Standards within any proposed changes to the Handbook—especially now that NRCS is heavily involved in the implementation of the CWA's Agricultural Conservation Practice Standards. Mentioning the CWA would remind agricultural producers that the conservation practices they employ in order to avoid any violation of the CWA may need to change in accordance with the proposed changes to the Handbook.

Also, NMDA requests that a summary statement of why each change to the Handbook is being made be provided to enhance the agricultural community's understanding of the changes.

Thank you for the opportunity to comment on these proposed changes to the *National Handbook of Conservation Practices.* NMDA requests to be included in any updates or mailing lists associated with this rule.

Please contact Lacy Levine at (575) 646–8024 with any questions regarding these comments.

Sincerely,

Hon. JEFF M. WITTE.

Works Cited

New Mexico Agricultural Statistics—2012. Available at *http://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/bulletin_12.asp*.

Environmental Protection Agency and U.S. Army Corps of Engineers, Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (79 FR 22276)—April 21, 2014. Available at *https://www.federalregister.gov/articles/2014/04/21/2014-07131/notice-of-availability-regarding-the-exemption-from-permitting-under-section-404f1a-of-the-clean*.

Freedom of Information Act Request to the U.S. Army Corps of Engineers

October 27, 2014

Humphreys Eng Center.
CEHEC–OC,
Alexandria, VA,
foia@usace.army.mil.

Re: Freedom of Information Act Request

To Whom It May Concern:

This is a request under the Freedom of Information Act (5 U.S.C. 552). This request is in regards to the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency's Proposed Rule for the Definition of "*Waters of the U.S.*" Under the Clean Water Act (79 FR 22188–22274) published April 21, 2014 under Dockets EPA–HQ–OW–2011–0880 and FRL–9901–47–OW.

The first sentence of Paragraph K—Environmental Documentation on 79 FR 22222 states:

"The U.S. Army Corps of Engineers has prepared a draft environmental assessment in accordance with the National Environmental Policy Act (NEPA). The Corps has made a preliminary determination that the section 404 aspects of today's proposed rule do not constitute a major Federal action significantly affecting the quality of the human environment, and thus preparation of an Environmental Impact Statement (EIS) will not be required."

The described Environmental Assessment and supporting documents cannot be found online. We request that a copy of the (1) Draft Environmental Assessment, (2) Final Environmental Assessment, and (3) Finding of No Significant Impact documents identified in 79 FR 22222 be provided to the New Mexico Department of Agriculture.

Please deliver the three documents via e-mail to Mr. Ryan Ward at *rward@nmda.nmsu.edu*, or by physical delivery to:

RYAN WARD,
Agricultural Programs and Resources,
New Mexico State University,
Las Cruces, NM.

If any clarification is needed, contact Mr. Ryan Ward at 575–646–2670 or Ms. Lacy Levine at 575–646–8024.

Sincerely,

ANTHONY J. PARRA,
Custodian of Public Records.

SUBMITTED LETTER BY DR. RON PRESTAGE, PRESIDENT, NATIONAL PORK PRODUCERS COUNCIL

March 25, 2015

Hon. GLENN THOMPSON,
Chairman,
Subcommittee on Conservation and Forestry,
House Committee on Agriculture,
Washington, D.C.;

Hon. MICHELLE LUJAN GRISHAM,
Ranking Minority Member,
Subcommittee on Conservation and Forestry,
House Committee on Agriculture,
Washington, D.C.;

Subject: NPPC Statement for the Record on the U.S. Environmental Protection Agency's proposed rulemaking on defining "*Waters of the United States*."

Dear Chairman Thompson and Ranking Member Lujan Grisham:

The National Pork Producers Council (NPPC) thanks you for holding your hearing March 17, 2015, to review the proposed U.S. Environmental Protection Agency rulemaking on defining "*Waters of the United States*" (WOTUS) and its impact on rural America.

NPPC is proud to represent and work on behalf of pork producers committed to protecting water, air and other environmental resources that are in their care or potentially affected by their operations. NPPC has previously submitted detailed comments on this proposed rule, and we attach a copy of those comments to this statement and will refer to them in the following. We offer you these observations and ask that they be included in the hearing record.

Sincerely,

Dr. RON PRESTAGE,
President,

National Pork Producers Council.

ATTACHMENT

Written Testimony of National Pork Producers Council

Introduction

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations that serves as the global voice for the nation's pork producers. The U.S. pork industry represents a significant value-added activity in the agriculture economy and the overall U.S. economy. Nationwide, more than 68,000 pork producers marketed more than 111 million hogs in 2013, and those animals provided total gross receipts of more than $20 billion. Overall, an estimated $21.8 billion of personal income and $35 billion of gross national product are supported by the U.S. hog industry. Economists Daniel Otto, Lee Schulz and Mark Imerman at Iowa State University estimate that the U.S. pork industry is directly responsible for the creation of nearly 35,000 full-time equivalent pork producing jobs and generates about 128,000 jobs in the rest of agriculture. It is responsible for approximately 111,000 jobs in the manufacturing sector, mostly in the packing industry, and 65,000 jobs in professional services such as veterinarians, real estate agents and bankers. All told, the U.S. pork industry is responsible for more than 550,000 mostly rural jobs in the United States.

U.S. Pork Producers Work To Protect Water Resources

NPPC is proud to represent and work on behalf of pork producers committed to protecting water, air and other environmental resources that are in their care or potentially affected by their operations. NPPC has previously submitted detailed comments on the proposed "*Waters of the United States*" rule. (A copy of those comments are attached to this statement.) NPPC offers the following observations and ask that they be included in the hearing record.

In recent remarks, U.S. EPA Administrator Gina McCarthy told a group of farmers that she wishes EPA had named the WOTUS rule the "Clean Water Rule" and that from this point forward that is what she is going to call it. NPPC welcomes this thinking and agrees with the Administrator, not because merely renaming the WOTUS rule will solve its numerous fundamental flaws that have caused so much concern for pork producers and all of agriculture. We don't think the Administrator means this either, for she understands nearly as well as the nation's hog farmers the folly of trying to make a silk purse out of a sow's ear. Instead, we agree with the Administrator because we sincerely believe that changing its name to the Clean Water Rule is an important first step toward finding our collective way out of today's jurisdictional policy maze that has trapped us all. Rather, focusing on the underlying concrete objectives of a newly-named Clean Water Rule is the way out. To pork producers, and anyone else with a deep understanding and appreciation of what it means to be a good steward of the lands and waters that feed and hydrate us, this means we should be talking about what it means to restore and protect water quality and water resources in both the aspirational and practical manners provided for in the Clean Water Act.

Congress has set the structure and authorities of the Clean Water Act, and much of the law about this is quite clear. Within this system, we believe the point and non-point source tools that EPA currently has for working with the states, counties, cities and people such as pork producers are more than adequate for them to continue to maintain and improve water quality. There are, undoubtedly, vexing Clean Water Act jurisdictional questions under the law and applicable court decisions. We all need and want more jurisdictional clarity, and we understand the need for a rule that addresses this. But starting from the question "what is jurisdictional" is functionally backward. The goal is clean water, not the forever-expansive growth of Federal jurisdiction over every drop of water and all land features and activities that affect that water, merely for the sake of jurisdiction.

For the previous 6 years, pork producers and others in agriculture have wanted the opportunity to participate in a serious discussion about the state of the nation's water quality and what farmers can do to help improve it. Unfortunately, under former Administrator Lisa Jackson, EPA often sought to hold those conversations without any representative voices from agriculture. Since becoming Administrator, Gina McCarthy has worked hard to change that dynamic and repair the relationship with agriculture. Hopefully, her desire to rename the proposed rule and change its focus will continue to further that progress and enable all stakeholders to engage in a meaningful discussion about the concrete goals of the CWA and allow us to focus on what water features merit designation as WOTUS subject to direct Federal controls under the Clean Water Act. The CWA has an aspirational goal of making

federally jurisdictional waters suitable for fishing and swimming, or other forms of recreation and habitat that involve relatively higher quality water conditions. For pork producers, these are the rivers and tributaries with substantial flows of water most of the time, lakes and the wetlands that are directly associated with them. We look at these and see the potential for broad agreement on the goals of the Clean Water Act applying.

The same is not true, however, for a large proportion of the water features that are upstream from these aspirational waters. Either because of a lack of water flow, or their construction and use in industry and agriculture, such upstream features are not and will never be part of that set of waters that could be fishable and swimmable or otherwise capable of supporting the more high quality uses aspired to under the Clean Water Act. Farmers look at these upstream features, such as the ephemeral drainage ways in their fields, the former ephemeral streams next to their fields that now serve a drainage functions and low lying wetter portions of the fields that lay next to these other features, and ask why the Federal Government would want to make these things subject to the full Federal force and control that comes with the Clean Water Act? To them, it makes no sense.

See, for example, the erosional feature captured in the photo in *Figure A* on page 9 of our attached comments. This is a photo from a farm field in Tennessee. We can show you photos in other farm fields with comparable erosional features. In these instances, public officials have told farmers these are now jurisdictional tributaries under the Clean Water Act. Given the proposed rule's definition of tributary, we agree. We wholeheartedly welcome Administrator McCarthy's commitment that EPA has heard loud and clear this problem and that the agency will amend the definition of tributary to exclude such features. We want her to know that farmers' concerns about calling many other upstream features WOTUS doesn't end with this type of erosional feature.

For example, see *Figures C & D* (pages 14–15) and *Figure E* (page 17) in our attached comments to the proposed WOTUS rulemaking. *Figure C* is an aerial view of farm land in northeastern Iowa with tributary features mapped using the National Hydrography Database (NHD) that EPA developed with USGS for use in part in EPA's online "MyWaters" mapper program. *Figure D* is a closer view of one of the "streams" that the NHD identifies at this location. Visible in this image is what appears to be a distinct channel in a portion of the NHD's ephemeral stream. *Figure E* is a comparable image, from the same data source, of such streams in a prominent agricultural area of Michigan. It is fair to believe that the features in both *Figures D* and *E* are jurisdictional tributaries under the proposed rule. As NPPC has discussed in its comments, analysis by EPA and others of the NHD data set indicate that there are millions of miles of such ephemeral features in the country.

Regulations Already Exist To Control Nutrient Runoff

We want the Committee, EPA and the public to know that pork producers wholeheartedly embrace their responsibility to make sure they are properly managing their manure to protect the water quality of the downstream water features that might be impaired because of nutrients moving through these upstream features. Not only are they committed to this, but they are required to do so as "point sources" under the Clean Water Act. The Clean Water Act is directly involved in pork operations through the Concentrated Animal Feeding Operation (CAFO) rule, which regulates how pork producers store, manage, handle and use manure in crop production. The standards they must meet are clear and unequivocal, spelled out in black and white in the CAFO rule.

This means that even if remote water features would not themselves be jurisdictional, producers have obligations under the law to address pollutant losses that might move through them into downstream jurisdictional waters. The U.S. pork industry is committed to managing manure to prevent direct spills into drainage ditches or ephemeral drainage features or small streams that may not be jurisdictional. Producers are committed, in the rare case of such a spill happening, to stopping the movement of that spill downstream so as to protect downstream water quality. And they are committed to using sound agronomic and conservation practices and keeping the associated records when land applying manure so that the applicable CAFO rule standard is met.

There is no need to make those remote or intermediate water features subject to Federal jurisdiction to have producers work on the movement or manure nutrients through them. The Clean Water Act already does that.

These same protections from point source discharges that may reach jurisdictional waters indirectly, through nonjurisdictional waters, reach far beyond the U.S. pork industry; they encompass every point source discharger, as defined in the Clean Water Act. The Clean Water Act is unequivocal in providing that discharges are still

point source discharges subject to NPDES permitting even if they reach a jurisdictional water indirectly, through a nonjurisdictional feature. Making those remote features WOTUS will not create any new or different permitting controls to impose on all of these other point sources, industrial, municipal or otherwise that may be discharging into the remote features.

Similar considerations and circumstances apply to row crop agriculture and its non-point source discharges that might reach downstream jurisdictional waters through upstream water features. Farmers everywhere are adopting and updating practices to prevent or minimize stormwater discharges. Not only are farmers doing this on their own as part of caring for their fields and seeking to conduct efficient operations, the Clean Water Act has a program expressly for this purpose—section 319. Furthermore, this Committee has jurisdiction over several USDA conservation programs that spend billions of dollars every year to reduce sediment and nutrient losses from farm and ranch lands. Lastly, under "Swampbuster," farmers are subject to severe penalties in the form of loss of crop insurance subsidies or other farm program payments if they drain, dredge, fill or level an agricultural wetland for the purpose of producing a commodity.

Upstream Features Shouldn't Be 'Jurisdictional'

Administrator McCarthy, in the aforementioned speech to farmers, firmly reiterated what the agency has said many times before: They do not intend to impose through this rulemaking any new restrictions on activities that now qualify for the Clean Water Act's exemptions from permitting as agricultural non-point source discharges. We take them at their word. Our question is: If that is the case, what is gained by making these upstream features jurisdictional when they have no real place, in and of themselves, in the Clean Water Act's aspirational scheme?

If this rule will not impose new regulatory measures on row crop agriculture, the work to reduce or minimize sediment and nutrient losses to surface water will continue to be voluntary, under our voluntary Clean Water Act and farm bill programs and through Swampbuster. Making upstream features with little or no resemblance to the types of waters that fit with the Clean Water Act's aspirational goals adds no water quality value to the downstream waters that we all want to protect.

EPA has basically argued through this rulemaking process that it wants to protect these upstream, more remote waters because of their importance to downstream waters. Our point is, all the protections and tools EPA needs to achieve this goal are in place under the Clean Water Act, without making these remote water features categorically jurisdictional. Yes, upstream drainage features have hydrological connections to downstream waters. Water does move with gravity. We agree. But if, as EPA has said, the goal is to protect those downstream waters, let's do that. Let's not make the upstream water features, which never will be fishable or swimmable, jurisdictional. At least, let's not do it categorically for the millions of miles of such features in the agricultural landscape across the country. If there are high quality upstream features that fit within the Clean Water Act's aspirational goals, EPA can make that call on a case-by-case basis. Otherwise, pork producers want to focus their time and effort on the work of managing sediments and nutrients to keep them out of waterways.

ATTACHMENT

Hon. GINA MCCARTHY,
Administrator,
U.S. Environmental Protection Agency
Washington, D.C.;

Hon. JO-ELLEN DARCY,
Assistant Secretary of the Army,
Department of the Army, Civil Works,
Washington, D.C.

RE: **Environmental Protection Agency and U.S. Army Corps of Engineers Proposed Rule to Define "*Waters of the United States*" Under the Clean Water Act EPA–HQ–OW–2011–0880**

Dear Administrator McCarthy and Assistant Secretary Darcy:

The National Pork Producers Council (NPPC) offers below comments on the Environmental Protection Agency and the U.S. Army Corps of Engineers ("Agencies") proposed rule to define "*waters of the United States*" (WOTUS) under the Clean Water Act (CWA). These comments are being submitted, in addition to comments also submitted by NPPC as part of a coalition of farm and agricultural stakeholders together with the American Farm Bureau Federation, the Waters Advocacy Coali-

tion, as well as the comments of the U.S. Chamber of Commerce. As stated in this set of comments, as well as in those other coalition comments, we believe there are numerous and substantial flaws with the proposed rule, including serious questions about the legal basis for the Agencies' approach to this proposal and several of the policies choices that the Agencies have made within the proposal, especially with regard to their impacts on agriculture. As a result, because of the numerous critical changes that must be made before this proposal, or its successor version, can be issued in final form, we believe the Agencies need to withdraw the entire proposal, rethink their underlying approach to the issue and better engage affected stakeholders throughout the process. Alternatively, if the Agencies are unwilling to withdraw the proposal entirely, we strongly urge that, following the close of the comment period and redrafting the proposal in response to the comments received, the Agencies re-propose the rule prior to issuing a final rule.

Still, we recognize the tremendous amount of work that has gone into the preparation and issuance of this proposed rule and the commitment that work represents to the important and valuable goals of the CWA. Despite sometimes heated public rhetoric, we believe that the intent of the Agencies to minimize the impacts on agriculture of the proposal was clear, and we appreciate the effort that was made to address the unique challenges that face pork producers and all of agriculture as a result of the WOTUS proposal. We share a commitment to those goals and are thankful for this opportunity to provide you with these comments. We offer them in the hope that we can continue to work with you and other stakeholders on a sound final rule that will guide CWA jurisdictional decisions for many years to come.

1. Statement of Interest

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations and the voice in Washington, D.C., for the nation's pork producers. The U.S. pork industry represents a significant value-added activity in the agricultural economy and the overall U.S. economy. Nationwide, more than 67,000 pork producers marketed more than 112 million hogs in 2013, and those animals provided total gross farm cash receipts of over $23 billion accounting for U.S. retail pork sales of over $54 billion.

NPPC is proud of the reputation it and its members have earned for initiating innovative environmental improvement programs. NPPC and its producer members take an active role in advocacy at both the Federal and state levels for clean water environmental initiatives. Accordingly, the U.S. pork industry continues to treat as its top goal meeting worldwide consumer demand while simultaneously protecting water, air and other environmental resources that are in our care or potentially affected by our operations. Pork producers support the efforts of the Agencies to protect the health of children and the environment and understand the concerns is the Agencies are striving to address through this proposed risk mitigation decision. However, the swine industry has two general concerns with the approach the Agencies have taken so far.

2. General Comments

The nation's pork producers are firm supporters of the CWA's goals and are committed to responsibly and wisely managing the manure produced by their animals to protect and restore water quality. Meeting the zero-discharge requirements of the CWA's Concentrated Animal Feeding Operations (CAFO) rule is a daily top priority for pork producers. Their animal housing and manure storage facilities are designed to contain 100 percent of the manure and wastes produced by the animals and to facilitate its safe, effective and efficient use as a crop fertilizer in farm fields. All of these activities are covered by specific requirements in the CAFO rule, and pork producers have embraced the required measures. Furthermore, nearly every major pork-producing state has its own extensive regulatory and permitting requirements, equal to or in many cases beyond the Federal CAFO rule.

Our producers' commitment to protecting water quality through the responsible and sound management of their animals' manure can be observed in farm fields wherever hogs are produced. This manure generally is used as a major source of nutrients to support crop production, adding to soil fertility and soil health. Pork producers know that manure management efforts are important to restoring and protecting the health and vitality of downstream, more-permanently flowing waters or traditional navigable waters (TNW). Pork producers' efforts to protect these waters, which are clearly jurisdictional under the CWA, start at the top of watersheds, commonly remote and a great distance from the TNWs, where their farms are found. They start on their own farms, in crop fields with drainage features, ditches and associated small streams that do not flow continuously.

Protecting water quality, both locally in the upper reaches of watersheds and downstream in the TNW, is the goal of the CWA. Pork producers are committed to continuing to work toward that goal even though local drainage features, ditches and small waterways may not be WOTUS categorically. They may not be WOTUS because many such features commonly, but not necessarily always, lack the substantial, non-speculative hydrological relationship to downstream TNWs. This relationship is not simply about chemical, physical or biological effects of the former on the latter. Establishing jurisdiction does entail taking into account the goals of the CWA. But the CWA also explicitly references navigability as a determinant of jurisdiction, and any effort to interpret jurisdiction must give sufficient meaning to this term. There must be sufficient hydrology moving through these upper watershed drainage features, ditches or small waterways to make it clear they are significant contributors to the navigability characteristic of a TNW. Only once such a relationship is established, case by case, is it proper for a determination to be made that such drainage features could be a WOTUS. Furthermore, only after establishing such a nexus can it be possible for a wetland adjacent to that feature to also be a WOTUS.

Like others in agriculture, pork producers are greatly concerned that under this proposed rule at least 5 million miles of remote drainage features, ditches and remote, ephemeral waterways and millions of acres of wet spots or farmed wetlands in fields are going to become jurisdictional. We find this result is not only inconsistent with the Supreme Court's direction to the agency but that it is also highly counterproductive and will drastically undermine the ongoing successful efforts to prevent nutrients and sediments from reaching local waterways and the TNWs.

3. Summary of the Proposed Rule

Key elements of the Agencies' definition for WOTUS are largely unchanged from previous rulemakings and are part of the settled law on this subject; traditionally navigable waters (TNW), interstate waters and territorial seas, as well as impoundments of such waters, are all clearly WOTUS under the law and as addressed in the proposed rule. Furthermore, also jurisdictional are wetlands that abut these features.

Most of the other major features identified in the proposed rule as WOTUS reflect the application of a relatively new and still insufficiently defined concept in CWA jurisdiction: "significant nexus." Under the proposed rule, all "tributaries," all "impoundments" of all tributaries and all wetlands and wet areas "adjacent" to these tributaries are categorically defined as WOTUS. Ditches, with two exceptions, are considered tributaries and, therefore, categorically WOTUS, regardless of the quantity, duration or frequency of the flow in them. Beyond these "categorically" WOTUS tributaries and adjacent waters, the proposed rule provides for finding "other," more remote waters or wetlands to be WOTUS on a case-by-case basis.

The proposed rule's reliance on or use of the significant nexus concept, as well as the rule's treatment of tributaries (including ditches), waters or wetlands defined as adjacent to these tributaries and the "other" isolated waters or wetlands, are discussed in more detail below.

A. Significant Nexus, Categorical and Case-by-Case WOTUS

The proposed rule states that "significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (*i.e.,* the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition." (See 79 FR 22263, April 21, 2014).

In attempting to assess what this nexus might be, the Agencies conducted an in-depth review of the science on the nature of connections between upstream waters or wetlands and the downstream TNW (see the *Connectivity Report*). The *Connectivity Report* discusses in numerous instances connections and effects of certain types of waters on downstream waters. However, the *Connectivity Report* does not distinguish in any scientific or quantifiable manner the relative strengths of these effects, nor does it quantify or identify the gradient of effects that may exist. While that report does make mention of the existence of a "gradient" or degree of such connections and their effects, and the Agencies make mention of that minimal

discussion of a gradient in the proposed rule's preamble (See page 22193), the Agencies did not craft any indicators or measures of the degree of these effects. Instead, the Agencies considered the *Connectivity Report*'s findings that tributaries and adjacent waters have some connection to downstream waters; that they have some chemical, physical or biological effects on those TNW; and that these effects are "significant" "in light of the law and science" and constitute a significant nexus categorically. (See pages 22195–22196).

This same definition of "significant nexus" is, in turn, to be used under the proposed rule in the case-by-case determinations of what are WOTUS in the instances of the (a)(7) "other" waters that are remote and not considered "adjacent" to tributaries. In deciding to use this significant nexus definition, the Agencies explicitly discuss the decision not to develop objective measures to determine significance in the case of these "other" waters, saying that to do so would restrict the necessary flexibility needed to make site-specific decisions case by case.[1]

B. Tributaries and Ditches

The proposed rule defines for the first time how the Agencies understand the term "tributaries," then uses the "significant nexus" finding (as discussed immediately above) to make all such tributaries WOTUS. Tributaries are defined as waters physically characterized by the presence of a bed and bank and ordinary high water mark (OHWM) and that contributes flow to a TNW and other waters. Any feature with those characteristics will be a tributary and, therefore, WOTUS no matter the quantity or duration of the flow. Tributaries with water flowing perennially (year round), intermittently (only in a season or part of a season or seasons, no matter how short the duration) or ephemerally (when rain falls and there is surface runoff) are categorically WOTUS.

Former ephemeral or intermittent streams that have been improved (*e.g.,* straightening, channeling, widening) to serve some other purpose (*e.g.,* drainage or water transport) are still a tributary and, therefore, WOTUS. The proposal states that a water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. In the Agencies' view, tributaries in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries because they significantly affect the chemical, physical or biological integrity of TNW and other jurisdictional waters.

Ditches, having a bed, bank and an OHWM, are considered to be tributaries and, therefore, categorically WOTUS, with two exceptions. The ditches that are WOTUS may have water in them ephemerally, intermittently or perennially. The classes of excluded ditches are (1) those excavated wholly in uplands, drain only uplands and that have flowing water in them less than permanently, and (2) those that do not contribute flow, either directly or indirectly, to a downstream WOTUS. Relative to the first exclusion, the term upland is not defined in the rule.

C. Adjacent Waters

All waters adjacent to TNW, tributaries, waters used in commerce, territorial seas and impoundments are WOTUS. The term "adjacent" means bordering, contiguous or neighboring. Waters, including wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes and the like, are adjacent waters. The term neighboring includes waters located with the riparian area or floodplain of a TNW or tributary or other similar water and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such waters.

Where a particular water body is outside of the floodplain and riparian area of a tributary but is connected by a shallow subsurface hydrologic connection with such tributary, the Agencies will assess the distance between the water body and tributary in determining whether or not the water body is "adjacent." The size of a floodplain will also vary and require the professional judgment of the Agencies to determine which flood interval to use to determine whether a water is in the floodplain and, therefore, adjacent to a jurisdictional water and a WOTUS for the purpose of this rule.

---

[1] "The Agencies do not propose absolute standards such as flow rates, surface acres or a minimum number of functions for 'other waters' to establish a significant nexus. A determination of the relationship of 'other waters' to traditional navigable waters, interstate waters or territorial seas and, consequently, the significance to these waters requires sufficient flexibility to account for the variability of conditions across the country and the varied functions that different waters provide." (22198.)

D. Other, Isolated Waters

"Other waters" are simply all other waters that have not already been defined to be jurisdictional or that are not otherwise excluded. The definition of "other waters" makes clear they are not jurisdictional as a category of waters. Rather, they are jurisdictional provided they are found on a case-by-case basis to have a significant nexus to TNW. Other waters will be evaluated either individually or as a group of waters, where they are determined to be similarly situated in the region. Waters are similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water. For other waters that perform similar functions, their landscape position within the watershed relative to each other or to a jurisdictional water is generally what determines how they are aggregated in a significant waters analysis.

4. Physical & Practical Implications of the Proposed Rule

A. WOTUS Tributaries and Drainage Features in Farming Regions

The Agencies have defined in the proposed rule, for the first time, what they believe a tributary is. In doing so as part of a notice and comment rulemaking, it is now possible to more effectively evaluate the scope and extent of what the Agencies understand to be CWA jurisdiction in terms of tributaries and wetlands or waters that may be adjacent to them. The Agencies' decision to treat all tributaries, no matter the amount of water flow involved, as WOTUS is overbroad and inconsistent with the direction and intent of the Supreme Court's holding. Aside from this basic issue of the rule's lawfulness, the potential scope and reach of making all ephemeral and intermittent tributaries jurisdictional are simply extraordinary. In practice, simply relying on the plain English meanings of the proposed rule, literally millions of miles of drainage features in every part of every farming region of the country will exhibit to some extent or another bed, bank and ordinary high water mark characteristics. In many cases those exhibited characteristics will be sufficient to make them tributaries under the rule.[2] In most other cases, they will be sufficient enough to make these features an attractive physical foundation for activist litigation against farmers.

The image in *Figure A* below was taken this past spring in a Tennessee farm field. The Corps of Engineers determined in the case of this field that the drainage feature running through it is a WOTUS. As a result, the owner of this property now needs a CWA Section 404 permit to begin developing the property, and such a permit would require that the lost "functions and values" from this so-called stream would need to be mitigated. The cost of this permit and associated mitigation efforts would be in excess of $500,000, and the time involved would easily take 1 to 2 years, possibly more.

This is not an accident, nor does it appear to be the result of unusually aggressive Corps field staff. *Figure B* is a picture from the Army Corps of Engineers' guidance for field staff on how to determine what is a tributary through the identification of a bed, bank and an ordinary high water mark. The "stream" identified here is nonperennial and is characterized as having "gradual (weak) breaks in slope" and, while it is lacking "evidence of strong vegetation changes," the sediment characteristics allow the channel to be identified. This depiction of the feature in *Figure B* could easily apply to that in Figure A. The fact is, this type of farm drainage feature is ubiquitous in farming areas. Such features simply do not merit designation as *waters of the United States* subject to Federal jurisdiction and control.[3]

---

[2] Indeed, regardless of whether the Agencies affirmatively delineate any specific tributary or drainage as jurisdiction in the future, the strong likelihood that they will be deemed so based on a plain reading of the rule will trigger significant changes in the relationship between landowners and other third parties.

For instance, as detailed in comments submitted by members of the agricultural banking, agricultural lending and agricultural credit industries, the potential that these features are jurisdictional—and the fact that they appear within the USGS National Hydrography Database as well as EPA's own internal mapping analysis—will be enough for a lender to assume they are. This in turn will result in lenders seeking to mitigate any risk, either from activist litigation or potential government enforcement action, by directly raising the cost to access the capital necessary to operate a farm, from buying seeds for spring planting to building grain storage or barns for housing livestock, and to impose various additional requirements on farmers' operations as a predicate to obtaining capital.

Needless to say, the Agencies' calculation of the economic impacts of the proposed rule failed to account in any manner for these types of direct impacts on stakeholders or the overall economy.

[3] "A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States," ERDC/CRREL TR–14–13, August 2014. Page 23.

Figure A: WOTUS Tributary in TN Farm Field as Determined by the Corps Earlier This Year

Figure B: Drainage Feature Considered To Have Bed, Bank and Ordinary High Water Mark Under Recent Army Corps Guidance on This Subject

Miles of Likely Jurisdictional Features—*Table A–1* in *Appendix One* presents the calculated number of miles for many but not all of the perennial, intermittent and ephemeral streams in 20 states, as captured in the USGS National Hydrography Database (NHD). Using the 1:100,000 medium resolution dataset, which roughly approximates the perennial and intermittent streams, we estimate there are slightly more than approximately 1.6 million miles of such streams in these 20 states alone. Using the 1:24,000 NHD dataset, which roughly approximates the perennial and intermittent streams plus about 35 percent of the ephemeral streams on average, we calculate that in these 20 states the number of stream miles jumps to approximately 3.5 million. That 1.9 million mile increase in streams between the medium resolution and high resolution estimates is because of, in large extent, the addition of the 35 percent of ephemeral streams to the calculation. The increase in stream miles would certainly be significantly higher if 100 percent of the ephemeral streams were included in the calculation.

EPA has conducted a similar mapping analysis of stream miles, and the results of that effort are posted on the U.S. House of Representatives Science Committee's website. The national analysis presented there indicates that there are 7,339,124 miles of linear streams in the United States (including Puerto Rico). Of these, 77 percent or 5,661,337 miles are intermittent or ephemeral streams.[4]

Ditches and Farmed Wetlands—"Farmed wetland" is a formal term developed through rulemaking under the Swampbuster authorities contained in Title XII of the 1985 Food Security Act (as amended in every farm bill since 1985). Farmed wetlands are generally determined to be wetlands under the wetlands manual used by the Army Corps of Engineers. As wetlands, any farm drainage ditch associated with water drainage from them would not qualify for the upland ditch exclusion. Drainage from these farmed wetlands is common. Farmed wetlands drain through overland flows under certain circumstances, or through field drainage systems. The area is still a wetland since it retains enough hydrology. Despite the drainage, the soils are nevertheless hydric and, under "normal" conditions as defined by the Food Security Act of 1985, hydrophytic vegetation would be present.

The most recent assessment that we are aware of concerning the number of farmed wetlands found in cropland and similar agricultural wetlands found in pasture of range lands was conducted by the USDA Economic Research Service (ERS) in 1998. USDA ERS estimated at that time that there were approximately 10.5 million acres of "farmed wetlands" in cropland and almost 8 million acres of wetlands in pasture areas and 8 million in range areas—more than 26 million acres in total.[5]

B. Adjacent Waters in Agriculture

The proposed rule makes categorically WOTUS all wetlands and waters that are adjacent to TNW, tributaries, waters used in commerce, territorial seas and impoundments. New to this definition is the addition of the term "waters" (as in "wetlands ***and waters***") to features that can be considered adjacent and, therefore, WOTUS. This is a significant expansion of the scope of the rule, as discussed below.

The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent waters. The term neighboring includes waters located within a river's or a tributary's biologically active riparian area or in its floodplain. Wetlands with a shallow subsurface hydrologic connection or confined surface hydrologic connection to rivers or their tributaries also are WOTUS.

Where a particular water body is outside of the floodplain and riparian area of a tributary but is connected by a shallow subsurface hydrologic connection with such tributary, the Agencies will assess the distance between the water body and tributary in determining whether or not the water body is adjacent. The size of a floodplain will also vary and require the professional judgment of the Agencies to determine which flood interval to use to determine whether a water is in the floodplain and, therefore, adjacent to a jurisdictional water and a WOTUS for the purpose of this rule.

The number of acres of land within which wetlands or waters could be found to be adjacent to a WOTUS and, therefore, categorically WOTUS is exceedingly large. The analysis that NPPC and several other agricultural groups conducted this summer, as discussed earlier and in *Appendix One,* used conservative assumptions about the possible size of the floodplains in 20 states and found that they encompassed 114 million acres of land. We used the Federal Emergency Management Agency's (FEMA) 100 year floodplains in these 20 states, plus the land in 70′ wide buffers around the smaller tributaries for which a FEMA floodplain is not available. As in the case for the estimates of the number of ephemeral stream miles from the USGS National Hydrography Database (NHD), this 114 million acre, 20 state figure is likely a significant underestimate since the NHD reflects on average approximately only 35 percent of the ephemeral streams in these states. The acres in floodplains around 100 percent of these streams would certainly be significantly higher than 114 million acres.

Floodplain areas of this size would certainly encompass large quantities of agricultural acres and could lead to a significant number of wet areas or farmed wetlands to be found "adjacent" to a tributary and, therefore, WOTUS. *Figure 5* below is an aerial image of an example of this from a farm in the southern United States.

---

[4] See *http://science.edgeboss.net/sst2014/documents/epa/national2013.pdf.*

[5] *Wetlands and Agriculture: Private Interests and Public Benefits,* by Ralph Heimlich, Keith Wiebe, Roger Claassen, Dwight Gadsby, and Robert House, Agricultural Economic Report No. AER–765, September 1998, Table 3, page 22 (see *http://www.ers.usda.gov/publications/aer-agricultural-economic-report/aer765.aspx*).

This farm field has a small depressional area (see circled area) in a corner of a field on three sides that includes a small tributary, which is mapped in the NHD dataset.

A small depression in a farm field can have standing water in it for a few days. Such depressions commonly do not have water in them for long periods of time and do not have the type of vegetation that would constitute making them wetlands, but that occurs as well. Yet if the drainage feature to which this water feature is adjacent is a WOTUS (as a former ephemeral stream, for example, improved for drainage purposes), this water feature could easily be considered a "water" under the proposed definition of adjacency and, therefore, categorically WOTUS. As such, when this area is cropped in dry years, it would be subject to the same section 402 liabilities discussed above in the case of tributaries in farm fields. As an adjacent water and, therefore, a WOTUS, this depressional area would also be subject to section 404 dredge and fill permitting requirements and liabilities as well.

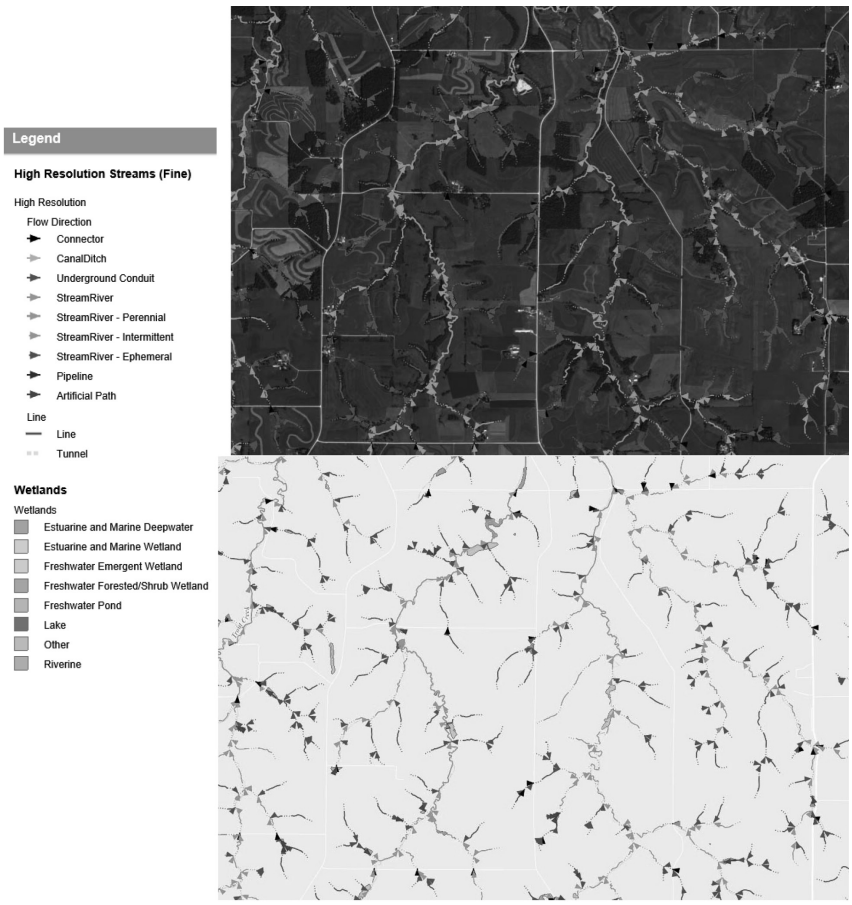
NPPC does not have estimates of the number of such small, occasionally flooded low spots in farm fields across the country. But it is fair to expect that any farm field of any size in a farming area with modestly rolling typography will have at least one of these, meaning the number of these small depressional wet areas runs well into the millions. These occasionally wet or ponded areas in farm fields should not be categorically WOTUS as an "adjacent" water.

C. Mapping and Photo Imagery of Likely Jurisdictional Features

What does this look like in practice? *Figure C* below is an image from the mapping analysis for northeast Iowa. What is evident from this image is that there is hardly a farm field in view that is not crossed by or intersected with one of these mapped streams. It is likely that the vast majority of the features depicted here have water in them only ephemerally, only after a rainfall.

It is also critical to realize that for those streams that are tributaries under the rule, including those that have drainage water in them only after a rainfall, any field-side or roadside drainage ditch they flow to will also be WOTUS (under the proposed rule any ditch draining a WOTUS is also a WOTUS). If all of these mapped streams are WOTUS, it is highly likely that every drainage ditch in this 10^2 mile area is a WOTUS even if it has water in it less than permanently.

Figure C: USGS "NHD Plus" Mapped Ephemeral and Intermittent Streams and Wetlands in Northeast Iowa Farming Region. Upper Image Is With Aerial Photography. Bottom Is Same Location With Gray Background



Geosyntec Consultants.
Source: Esrl. DigitalGlobe, GeoEye, i-cubes, Earthstar Geographics.

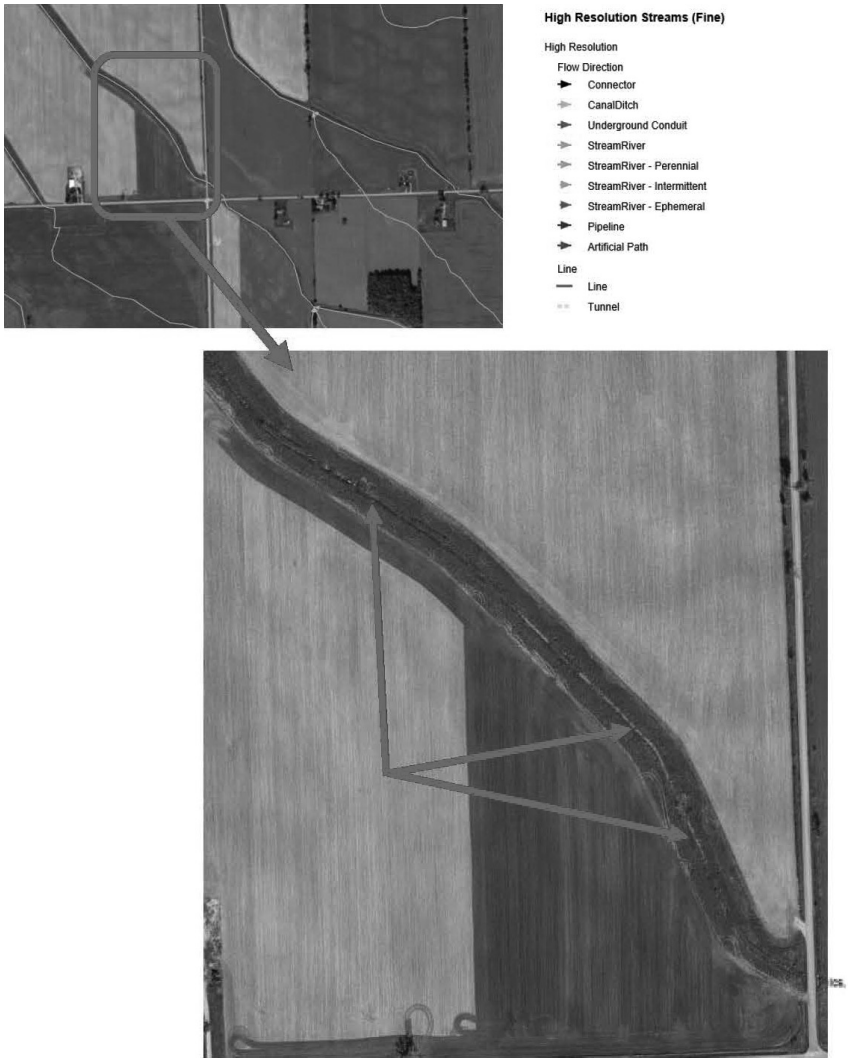
Will all of the mapped features, including the numerous ones that are ephemeral, be found to be a tributary as defined in the proposed rule through a formal determination? Every farm depicted here has to worry about that since using USGS NHD data and even EPA's online "My Waters Mapper," labels features such as these streams or ditches.

See, for example, the image in *Figure D* below, which is a detail from *Figure C* in northeast Iowa. Visible in this image is what appears to be a distinct channel in a portion of the NHD's ephemeral stream. It is a fair working assumption that this feature is a jurisdictional tributary under the proposed rule, since a tributary does not have to have the channel throughout its length, as specified in the rule. Anyone farming this very typical Iowa farmland faces a host of serious and negative consequences. This is because this ephemeral feature, clearly managed for purposes of draining farm fields, will likely be jurisdictional under the proposed rule. As discussed elsewhere in these comments, analysis by EPA and others of the NHD data set indicate that there are millions of miles of such ephemeral features in the country.

Figure D: Detail View From *Figure C*. Note the Visible "Channel" in Some Portions of the Ephemeral Stream

For example, the imagery in *Figure E* is from the "thumb" region of Michigan. The upper image has the NHD-Plus mapped features. States can vary in the labels they give to USGS as part of the NHD data collection process, and in Michigan's case in this part of the state these features, some of them with obvious stream-like characteristics, are labeled as "canal/ditch." The upper image covers multiple fields, and the lower image is cut from one of the fields with the NHD line turned "off." Again, clearly visible is an actual physical channel and the characteristic streamlike morphology for the drainage area that lies under the mapped flowlines.

Figure E: Stream-like NHD "Canal/Ditch" Features in Michigan Thumb, With Detail View of Visible Channel



NPPC encourages the Agencies, before finalizing this rulemaking, to conduct a thorough and accurate field review of this class of features across the country and to provide NPPC and the rest of agriculture with their assessment of the likely jurisdictional consequences for these features.

Lacking such an assessment, the Agencies have undertaken this rulemaking in the absence of critical and important information to help them and the public assess the practical effects of the policies being advanced in the proposed rule.

D. Practical Consequences of the Proposed Rule

Uncertainty and Confusion—In the proposed rule, as well as throughout the rulemaking process, the Agencies have made it extremely clear that one of the primary goals for the proposed rule is to create certainty for the regulated community. Unfortunately, for pork producers and others in agriculture, the rule fails to do that. Rather, in fact and practice, the exact opposite will occur. The farm drainage features depicted here, many with visible channels even at this elevation and visible

in farm fields in nearly every farming region in the country, appear to be WOTUS. While the Agencies continue to stress in their public statements that many of these features won't be WOTUS, the plain language of the rule leads farmers to a different conclusion. While the Agencies claim that any formal determination of a drainage feature as a WOTUS will only occur following the outcome of a formal determination, the inability to know what the outcome of that process will be is a source of tremendous uncertainty for farmers. Not only is there uncertainty created by the definition of tributary as it might be interpreted in the field, every farmer knows that that field judgments will have their own uncertain outcome, depending on the subjective and different judgment calls made by different agency personnel.

There also are the uncertainty and liability farmers potentially face from citizen suits alleging on the basis of these apparent facts that these are in fact tributaries. Those suits will claim, following the logic of the proposed rule, that these features (and the fields they drain) have a "significant nexus" to a WOTUS and a TNW and are, therefore, critical to the "chemical, physical and biological integrity" of the nation's jurisdictional waters. Further, following the logic of the proposed rule and the structure of the CWA, these suits will also claim that such drainage features require their own CWA "water quality standards," that they must be "assessed" as to whether they are "attaining" their "designated use" and, if "impaired," that they must have a "TMDL" applied to them.

Citizen Suits and New Permitting Liabilities Created by the Proposal—Beyond these concerns, and even more fundamentally important, are the concerns for what will happen as a result of agency action or activist litigation if these farm drainage features are made WOTUS and subject to permitting under section 404 and section 402 of the CWA.

The Agencies rightly point out that this rulemaking has not changed the application of the section 404 exemptions for "normal farming activities" or the application of the "agricultural stormwater exemption" from section 402 permitting. We agree. But there is far more and far more troubling consequences of making these drainage features WOTUS.

In making these farm drainage features WOTUS, the Agencies are inviting an ever-increasing wave of activist lawsuits, many of which are designed not to protect the environment or water quality but to advance issues such as veganism, animal welfare and opposition to modern science and to restrict farmers ability to decide what crops they grow and prevent them from utilizing modern scientific advancements that make food and crop production more efficient and reliable.

As an initial matter, the Agencies must expect that this wave of lawsuits will challenge the application of fertilizers and pesticides onto, over, into or near these drainage features, arguing that the fertilizer or pesticide applicator is a point source and that a section 402 National Pollution Discharge Elimination System (NPDES) permit is required to farm the land. This was the logic adopted by the *Cotton Council* decision, which held that aquatic pesticides applied from a nozzle onto, over, into or near WOTUS require a CWA NPDES permit. The court reached this conclusion even though the pesticides are only allowed to be used under separate, longstanding Federal pesticide law, following a mandated rigorous and expensive scientific study, review and labeling process.

The lawsuits challenging farmers' use of terrestrial pesticides under the agricultural stormwater exemption, even though used under a label and requirements created in the Federal process, would effectively result in the Federal NPDES permitting of the use of pesticides in the entire farm field or the establishment of mandatory, large buffers around these features in which agricultural production would not occur. The same is true for the use of any fertilizer (whether manure or synthetic) near or in these drainage features. This could occur despite the fact that society is dependent on the ability of farmers to fertilizer agricultural fields to provide the food and nutrition necessary to sustain life.

What's more, these suits will actually decrease water quality. It is universally recognized as appropriate and necessary, including under Federal conservation practice standards, to fertilize the grass stands in and immediately adjacent to these drainage features to ensure a healthy, erosion-controlling and soil-stabilizing stand. The anti-agriculture activist lawsuits that EPA is inviting through this rulemaking will simply be able to ignore the long-standing agricultural stormwater exemption, which was essential to Congress's passage of the Clean Water Act in the first place, and to create a system that provides a significant disincentive for farmers to appropriately manage their drainage and install conservation measures.

In the case of the section 404 dredge and fill permitting program, it is pork producers' experience that if the drainage features such as those depicted in *Figures 1* and *2* are made WOTUS, or could possibly be WOTUS, farmers in many parts of the country will invariably face stepped up section 404 obligations, costs and li-

abilities. This will be despite the "normal farming exemption" in section 404(f)(1). At a basic level this will be for the simple reason that there will be an exponential increase in the number of instances farmers will need to seek from the Corps the normal farming exemption. Time and costs will be involved in those requests in nearly every instance. Furthermore, the Corps in many of its districts has a long history of being very reluctant to grant the normal farming exemption (claiming a recapture of the activities under section 404(f)(2)) or of being able to impose certain constraints on activities in granting the normal farming exemption.

The issues under section 404 do not stop there. The section 404(f)(1) normal farming exemption does not include many activities, such as land shaping, that may occur in these drainage systems to facilitate the creation or management of more effective farm drainageways. Making these ephemeral and intermittent drainage features WOTUS will invariable result in more section 404 permitting in farm country. All of these section 404 concerns could result from either the Corps' own implementation of its program in light of the rulemaking or as a result of activists' lawsuits under the CWA, forcing the Corps, or farmers, to do so.

This rulemaking cannot and must not be conducted without taking into full account the long history of the CWA, with several recent examples during the past 6 years, where activist groups have pursued legal challenges to the Agencies' policies and the private sectors' actions. These suits were made possible by the "creative" or "imaginative" interpretations of the Agencies' authority under the CWA. The suits themselves take that logic further and expand the authorities beyond even those in the red letter versions of rules and guidance. No one should be naïve enough to think that such litigation will not follow this rulemaking if finalized in its proposed form or close to it. Indeed, if this rule is finalized, EPA, the Army Corp of Engineers and the U.S. Department of Agriculture should expect activist challenge to pesticide or fertilizer application and efforts to force permits on farmers for things as basic as planting seeds (especially if that seed has benefited from the advances of modern science). The fact that in the recent past there is an overwhelming abundance of evidence showing the Agencies deliberately formulated policy in rulemaking, guidance or out-of-court settlements to facilitate this kind of destructive follow-on activist litigation makes NPPC and the rest of agriculture exceedingly cautious about this proposed rule and its implications.

The bottom line is that EPA's own mapping analysis discussed above estimated that for the nation there are more than 5 million miles of ephemeral and intermittent streams. All of these certainly do not lie in farm country. But it is reasonable to assume that since farming and ranching are the most common land use in states, most of these 5 million miles of streams are in farming and ranching country. Each of those likely millions of stream miles overnight would become for farmers, with the simple stroke of a pen, a potential and very serious regulatory or legal liability that did not exist before this rulemaking if it is finalized in its proposed form.

5. The Proposed Rule & the Law

NPPC is a member of the Waters Advocacy Coalition (WAC), and we endorse and support the comments that the WAC has submitted on the proposed rule. We draw your attention to the detailed comments on the lawfulness of critical elements of the proposed rule and ask that you consider these carefully. Below we restate some of these same views, offering our own perspective on the nature and implications of these matters.

The proposed rule struggles with a difficult issue: Which of the non-navigable tributaries, waters adjacent to tributaries and impoundments of them and other more remote and isolated waters are properly considered subject to Federal CWA jurisdiction ("non-navigable waters"). The statute, as it has come to be understood through three Supreme Court decisions, does not solely encompass navigable waters. Congress signaled an intent to make jurisdictional at least some of the non-navigable waters. The factual subject matter of this dispute between us and the Agencies as it has played out in the three cases before the Supreme Court has involved wetlands and when these non-navigable waters should be jurisdictional. The Agencies had adopted a broad view of their jurisdiction in the case of wetlands, and the Court addressed those. We were not aware that the Agencies had also adopted a similarly broad and extensive view of their jurisdiction over non-navigable tributaries since this has never before been developed or discussed in a meaningful way in any rulemaking. But these Supreme Court decisions, particularly the last two, have brought matters involving both wetlands and tributaries to a head, and for the first time the Agencies have defined in rulemaking what they mean by tributary, the extent of Federal jurisdiction over these features and what that also means for wetlands and other waters.

We are of the view that the Supreme Court decisions provide sufficient guidance to the Agencies on these non-navigable waters questions, not only for wetlands but also for the tributaries to which those wetlands may be either associated with or remote from. As the Agencies have worked over the last 40 years to understand the scope of the CWA's jurisdiction beyond the navigable waters, it is fair to say that agriculture and many other private interests have uniformly found the Agencies' interpretations of this scope to be far too broad. This remains the case in the instance of this proposed rule, in light of these Supreme Court decisions, as we discuss below.

The foundational concept out of the two most recent decisions comes back to the question of navigability and that jurisdictional decisions must give meaning to the term navigable as it is used in the statute to define jurisdiction. As difficult, complicated and highly imperfect a job it is to find a way to give meaning to that term, it must be done. The bottom line in our view is that non-navigable waters can be jurisdictional under the CWA where there is a substantial hydrological contribution to navigable waters. That substantial contribution must be sufficient to allow these non-navigable waters to be considered a significant part of a system of waters whose defining feature is navigability. This is the case notwithstanding the fact that the significance of chemical, physical or biological effects on TNW can also be taken into account. In our view, though, these latter effects are not necessary and certainly not sufficient to establish jurisdiction. These chemical, physical, and biological effects are, of course, central to the ***goals*** of the CWA, which is about restoring the chemical, physical and biological integrity of the nation's waters. We wholeheartedly embrace and support this goal. The goal informs and guides work all of us, including pork producers, must be doing around and in the nonjurisdictional waters. But the goal does not define jurisdiction and where the full weight and regulatory mechanisms of the CWA come into play. Navigability does.

The Supreme Court decisions have lead the Agencies to try to answer this question of which non-navigable waters are jurisdictional in terms of a "significant nexus." That is appropriate in light of those decisions. We believe, though, that the Agencies have failed to define "significant nexus" in a meaningful, non-arbitrary manner. The Agencies are given deference on matters of judgment and science if they have gone through a reasoned process to arrive at their position, even if contrary views are possible. The definition offered for significant nexus, though, fails such a test since it says, in essence, that a significant nexus is a nexus that is significant and substantial. Not only have the Agencies failed to define significant or substantial in meaningful terms, the definition's application in the field will necessarily be highly subjective and arbitrary. As result, substantial work on and changes to this definition will be necessary before a final rule can be issued.

6. Suggested Changes to the Proposed Rule

A. Significant Nexus

We strongly encourage the Agencies to take time to work through the science record to develop some concrete, quantitative measures of the degree of effects between non-navigable and navigable waters. This is the case whether the Agencies accept our view that those effects must be grounded in the concept of navigability or rely on the broader chemical, physical or biological effects investigated in the *Connectivity Report.* We note that the Science Advisory Board's comments to the Agencies on the *Connectivity Report* took direct note of the fact that clear gradients of effects do exist, and it encouraged the Agencies to develop that science and thinking further. We could not concur more.

B. Defining Upland

As discussed above, a host of problems with the proposed rule stem from the term "upland" not being defined. We recommend that upland be defined as the parts of the landscape from which water moves off predominately in the aftermath of wet weather. This water can move either as sheet flow or as concentrated flow through conveyances of some type. The key is that the water is flowing because of specific weather events. The water can flow ephemerally or seasonally as a result of weather. We fully support the proposed exclusion from jurisdiction of any upland ditch that flows less than permanently.

C. Farm Drainage Features

We recommend that upland drainage features be excluded from being treated as WOTUS, though the Agencies can retain the ability to deem a feature WOTUS on an individual case-by-case basis, following on-farm visits and review of relevant data using the improved version of significant nexus as discussed above. In doing so, there should be a clear regulatory presumption that the drainage feature is excluded. If an individualized delineation determines that the farm drainage feature

is indeed WOTUS, there should be no reach back to penalize actions and activities with regard to the drainage that were otherwise reasonable and undertaken prior to a delineation as WOTUS.

D. Farmed Wetlands and Wet Areas

If upland and farmed drainage features are dealt with as above, the issue of possible farmed wetlands and wet areas in fields being WOTUS via adjacency is addressed.

E. Adjacency

We strongly recommend that only wetlands be considered possibly adjacent WOTUS and that the arbitrary and subjective concept of "waters" not be included. What does waters mean in this instance? How much or how little water needs be present, and for how long, for it to be one of these "waters"? It is possible to be quite specific when referring to "tributaries" (as evidenced in the definition in the proposed rule). Similarly, impoundments of tributaries are relatively easily understood, as are wetlands given the extensive history of wetland determinations by the Agencies. This is not the case for "waters," and we strongly encourage the Agencies not to introduce confusion, uncertainty and lack of clarity to this situation by now adding "waters."

F. Defining "Floodplain" as an Aspect of "Neighboring"

In the case of the use of a floodplain to determine adjacency, we suggest that the relationship between the wetland and tributary in question must be relatively persistent, common and significant. The direct hydrological interaction must be more common than not, and as a result we suggest the extent of the floodplain be defined by the reach of flood waters as a result of a 5 year, 24 hour rainfall flooding event.

G. Prior Converted Cropland

We strongly recommend that the Agencies spell out what they believe prior-converted cropland is and how they work with USDA in using the USDA PCC determinations. In particular, we believe a discussion in the preamble of the final rule that details the long relationship and history of coordination between the Agencies and USDA on the issue of PCC determinations would help address any uncertainty pork producers or others in agriculture have regarding the potential treatment of PCC under the proposed rule. In particular, there should be a clear discussion of the number of occasions an NRCS PCC determination has been overturned by the Agencies and the circumstances that existed when that occurred. Additionally, in furtherance of the stated goal of providing clarity and certainty to farmers, we strongly urge the Agencies to expressly define what they consider PCC by simple reference to the current regulatory standards implementing the provisions of the 1985 Food Security Act, set forth at Title 7, Part 12 of the *Code of Federal Regulations.*

7. Summary & Conclusion

Thank you for the opportunity to submit these comments on this important issue to the nation's pork producers. As we've previously stated, we appreciate the efforts the Agencies went through to prevent this rule from imposing significant impacts on farming and traditional agricultural practices. Unfortunately, because of the enormous complexities involved, they have failed to do that. NPPC urges the Agencies to withdraw the proposed rule and to convene a process with significant input from states, local governments and regulated stakeholders and landowners to redraft the rule to ensure its suitability and effectiveness. If that is not practical, we strongly encourage the Agencies to consider, after reviewing the numerous comments they receive and adjusting the proposal accordingly, to issue a second proposed rule to allow affected stakeholders an opportunity to ensure that the Agencies understood the comments and incorporated them into a rule that will work for all of American agriculture.

We would welcome the opportunity to discuss these comments in more detail or otherwise assist the Agencies as they go forward with reviewing and revising the proposed rule. If you need additional information, or to reach us, please feel free to contact Michael Formica, Chief Environmental Counsel, at NPPC's Washington, D.C., office at 202–347–3600

Sincerely

HOWARD HILL,
President, National Pork Producers Council.

APPENDIX 1: RESULTS FROM AGRICULTURES' WOTUS MAPPING INITIATIVE (AWMI)

NPPC worked this summer with several agricultural groups to map streams and their floodplains in 20 states to help visualize what the proposed rule means for farmers and to calculate the affected stream miles and the acreage in floodplains that may be associated with these streams (these latter estimates are discussed in section 4 that addresses "adjacency"). This effort was carried out to help visualize proposed jurisdictional tributaries and adjacent areas and to calculate certain statistics about these proposed jurisdictional features.

The streams data used in the mapping analysis are from the publicly available U.S. Geological Survey's National Hydrography Database (NHD), which is the same data that EPA's Office of Water uses in its online mapping utility, My Waters Mapper. Two sets of streams data were mapped: the 1:100,000 (medium resolution) dataset, which is roughly an approximation of perennial and intermittent streams (depicted as blue lines); and the 1:24,000 (high resolution) dataset, which is roughly an approximation of perennial and intermittent streams plus on average about 35 percent of the ephemeral streams (depicted as red lines).

Floodplain estimates are from two sources. The Federal Emergency Management Agency (FEMA) has estimated 100 year floodplains for many of the country's major rivers in publicly available datasets, and these were used. The many streams for which no FEMA floodplain data are available were overlain with 35′ buffers on either side to approximate their floodplains or possible areas of adjacency.

Table A–1 below presents the calculated number of stream miles in 20 states for both the medium- and high-resolution datasets, and the number of acres in the FEMA 100 year floodplains and the 35′ buffers for the streams for which no FEMA data were available.

The results of the AWMI efforts can be seen on a publicly available website that NPPC and the other agricultural groups have sponsored at *www.tinyurl.com/EPAwaters* [*http://geosyntec-can.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=9952781243db4c069d0556d04d7d8339*]. Note in this website that in zooming in to the surface the AWMI switches from the NHD streams data discussed above to the USGS NHD-Plus dataset, which depicts streams, canals, ditches, related waters and the wetlands identified in the Department of the Interior's National Wetlands Inventory. These NHD-Plus data are available for all 50 states, not just the original 19 states mapped in the AWMI. The legend to the left of the screen indicates the depicted features.

The mapped features in the AWMI are not formal CWA jurisdictional determinations. But they are river, stream, canal and ditch features as collected by USGS, in cooperation with EPA and others. The proposed WOTUS rule references agency personnel using such mapping utilities in assisting them in making jurisdictional determinations. While it is not likely that each and every one of the stream and ditch features depicted in the NHD is a jurisdictional water, there is likely quite a strong correspondence between the depicted stream features and what the proposed rule considers to be tributaries. Certainly, even if some of these features do not prove to have the stream morphology that would make them tributaries as defined in the proposed rule, their inclusion in Federal USGS datasets as streams and their depiction as such in mapping utilities like the EPA's MY Waters Mapper certainly leads to the working presumption by agency personnel and the public that they are WOTUS.

Table A–1

State	Stream Miles, Medium Resolution	Acres in Floodplains and Buffers, Medium Resolution	Stream Miles, High Resolution	Acres in Floodplains and Buffers, High Resolution
Alaska	200,000	3,890,000	792,000	11,340,000
Arkansas	88,300	5,581,000	137,000	5,899,000
Colorado	104,000	5,787,000	277,000	7,090,000
Florida	55,700	12,944,000	99,500	13,139,000
Iowa	71,900	2,799,000	114,000	3,110,000
Louisiana	57,000	6,873,000	109,000	7,189,000
Michigan	57,900	1,477,000	81,000	1,621,000
Minnesota	77,400	1,529,000	105,000	1,759,000
Missouri	104,000	4,652,000	184,000	5,160,000
Montana	180,000	18,600,000	390,000	20,040,000
N. Hampshire	10,700	136,300	18,600	189,500
North Carolina	65,000	5,648,000	130,000	6,128,000

Table A–1—Continued

State	Stream Miles, Medium Resolution	Acres in Floodplains and Buffers, Medium Resolution	Stream Miles, High Resolution	Acres in Floodplains and Buffers, High Resolution
Ohio	58,900	1,995,000	91,200	2,234,000
Pennsylvania	63,900	1,387,000	86,000	1,603,000
South Dakota	101,000	6,430,000	164,000	6,860,000
Virginia	54,600	2,375,000	106,000	2,766,000
Indiana	31,900	1,399,000	131,000	2,178,000
Mississippi	83,200	6,517,000	155,000	6,958,000
Illinois	72,400	3,810,000	120,000	4,160,000
Washington	76,400	3,023,000	236,000	4,310,000
Total	**1,614,200**	**96,852,300**	**3,526,300**	**113,733,500**

SUBMITTED STATEMENT BY NATIONAL ASSOCIATION OF REALTORS®

Introduction

On April 21, 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed to reduce the amount of scientific analysis needed in order to declare a "water of the U.S." including wetlands on private property across the country. On behalf of one million members involved in all aspects of commercial and residential real estate, the National Association of REALTORS® (NAR) thanks you for holding this oversight hearing and for the opportunity to submit these written comments for the record. If enacted, this rule could force many across rural America to obtain a Federal construction permit for the first time which could have significant multiplier effect on home sales, values as well as the communities' tax base. We urge the Congress to take immediate action to reign in and prevent this EPA overreach of Congressional authority.

Currently before declaring a water of the U.S., the agencies must first conduct a "significant nexus" analysis for each stream or wetland to determine that regulation could prevent significant pollution from reaching an ocean, lake or river that is "navigable," the focus of the Clean Water Act. Because, in the agency's view, a full-blown scientific analysis for each water or wetland is "so time consuming and costly," the agencies are proposing instead to satisfy this requirement with a more generic and less resource intensive "synthesis" of academic research showing "connectivity" between streams, wetlands and downstream water bodies. On this basis, the agencies believe that they can waive the full analysis before regulating most of streams and wetlands, and reduce the analysis for any "other water" that has more than a "speculative or insubstantial" impact. We disagree.

NAR opposes this vague and misguided "*waters of the U.S.*" proposed regulation. While perhaps an administrative inconvenience, site-specific data and analysis forces the agencies to justify their decision to issue wetland determinations on private property and focus on significant impacts to navigable water. By removing the analytical requirement for regulation, the agencies will make it easier not only to issue more determinations but also force these property owners to go through a lengthy Federal negotiation and broken permit process to make certain improvements to their land.

At the same time, the proposal does not (1) delineate which improvements require a Federal permit, (2) offer any reforms or improvements to bring clarity or consistency to these permit requirements, or (3) define any kind of a process for property owners to appeal U.S. water determinations based on "insubstantial" or "speculative" impacts. The resulting lack of certainty and consistency for permits, or how to appeal "wetland determinations," will likely complicate real estate transactions such that buyers will walk away from the closing table or demand price reductions to compensate for the hassle and possible transaction costs associated with these permits. We urge Congress to stop these agencies from moving forward with this proposal until they provide a sound scientific basis for the regulatory changes and also streamline the permitting process to bring certainty to home- and small-business owners where wetlands are declared.

Proposed Rule Eliminates the Sound Science Basis for U.S. Water Determinations

Today, the EPA and Army Corps may not regulate most "*waters of the U.S.*," including wetlands, without first showing a significant nexus to an ocean, lake or

river that is navigable, the focus of the Clean Water Act. "Significant nexus" is a policy and legal determination based on a scientific site-specific investigation, data collection and analysis of factors including soil, plants, and hydrology.

The agencies point to this significant nexus analysis as the reason they are not able to enforce the Clean Water Act in more places like Arizona and Georgia.[1] On its website, EPA supplies these "representative cases" where it's currently "so time consuming and costly to prove the Clean Water Act protects these rivers." EPA also documents the "enforcement savings" from the proposal in its economic analysis.[2] None of these major-polluter examples involve home or small business owners, which typically do not own significant acreage (the typical lot size is a ¼ acre),[3] let alone disturb that amount of wetland with a typical home project.

Under this proposal, the agencies would waive the site-specific, data-based analysis before regulating land use on or near most streams and wetlands in the United States (see ***Table 1****). The proposal:*

- Creates two new categories of water—*i.e.,* "all tributaries" and "adjacent waters."
- Adds most streams, ponds, lakes, and wetlands to these categories. "Tributary" is anything with a bed, bank and "ordinary high water mark," including some "ditches." "Adjacent" means within the "floodplain" of the tributary, but the details of what constitutes a floodplain, like how large an area (*e.g.,* the 5 year or 500 year floodplain), are left to the unspecified "best professional judgment" and discretion of agency permit writers.
- Moves both categories from column B (analysis required for regulation) to column A (regulated without site specific data and analysis).

Table 1. Proposed changes to "*Waters of the U.S.*" regulatory definition

Column A (Regulated without analysis)	Column B (Analysis required for regulation)
Navigable or Interstate • The Ocean • Most Lakes • Most Rivers	
Non-Navigable and Intrastate • **All** ~~**Some**~~ Tributaries (Streams, Lakes, Ponds) ◦ Perennial ◦ Seasonal ◦ **Ephemeral** • **Most** ~~**Some**~~ Wetlands ◦ Adjacent to navigable water ◦ **Adjacent to** ~~**Directly Abutting**~~ covered stream	Non-Navigable and Intrastate • ~~**Rest of the Tributaries**~~ ◦ ~~**Ephemeral**~~ • Rest of Wetlands ◦ ~~**Adjacent to tributary**~~ ◦ Not adjacent • Any other water ◦ **Adjacent to navigable water** ◦ **Adjacent to tributaries** ◦ Not-adjacent

For any remaining or "other water," the agencies would continue regulating case-by-case using a significant nexus analysis. However, the amount of analysis is dramatically reduced. Under this proposal, all agency staff would have to show is more than a "speculative or insubstantial" impact to navigable water. If, for instance, there were many wetlands within the watershed of a major river, no further analysis would be required to categorically regulate land use within any particular wetland with that river's watershed. Also, the data and analysis from already regulated water bodies could be used to justify jurisdiction over any other "similarly situated" water without first having to visit the site and collect some scientific data.

Contrary to agency assertions, this proposal does not narrow the current definition of "*waters of the U.S.*"

---

[1] *http://www2.epa.gov/uswaters*—for links to the examples, click "Enforcement of the law has been challenging."

[2] *http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf*.

[3] American Housing Survey, 2009.

- While technically not adding "playa lakes," "prairie potholes," or "mudflats" to the definition, the proposal does remove the analytical barrier which, according to EPA, is preventing both agencies from issuing U.S. waters determinations on private property in more places including Arizona and Georgia.
- Codifying longstanding exemptions (prior converted crop land and waste treatment) does not reduce the current scope of definition; it simply writes into regulation what the agencies have already been excluding for many years.
- Giving up jurisdiction over "ornamental" (bird baths), "reflecting or swimming pools" is not a meaningful gesture, as it's doubtful that any court would have let them regulate these, anyway.
- It is not clear that many ditches would meet ALL of the following conditions—*i.e.,* wholly excavated in uplands AND drains only uplands AND flows less than year-round—or never ever connects to any navigable water or a tributary in order to qualify for the variance. Also, the term "uplands" is not defined in the proposal so what's "in or out" is likely to be litigated in court, which does not provide certainty to the regulated community.

Literature Review and Synthesis Does Not Support the Proposed Rule

In lieu of site-specific, data-based analysis, the EPA and the Corps are proposing to satisfy the significant nexus requirement with a less resource intensive "synthesis" of academic studies. The agencies believe these studies show "connectivity" between wetlands, streams and downstream water bodies, and that's sufficient in their view to justify and waive the full analysis for land-use regulations on or within the floodplain of one of these waters.

However, this synthesis is nothing more than a glorified literature review.[4] EPA merely compiles, summarizes and categorizes other studies, and labels them a "synthesis." *EPA conducts no new or original science to support or link these studies to its regulatory decisions.* Three quarters of the citations included were published before the Supreme Court's decision in *Rapanos* v. *U.S.* (2006), and the rest appear to be more of the same. It breaks no new ground. The Supreme Court did not find this body of research to be a compelling basis for prior regulatory decisions, either in *Rapanos* or *SWANCC* v. *the Army Corp* (2001). Putting a new spin on old science does not amount to new science.

In addition, scientists with GEI Consultants[5] reviewed the literature synthesis and concluded that these studies do not even attempt to measure, let alone support a significant nexus finding. According to GEI,

> "Most of the science on connectivity . . . has been focused on measuring the flow of resources (matter and energy) from upstream to downstream . . . [T]hese studies have not focused on *quantifying the ecological significance* of the input of specific tributaries or headwaters, alone or in the aggregate, and ultimately whether such effects could be linked directly and causally to impairment of downstream waters."[6]

Knowing how many rocks downstream came from upstream won't tell you what the Supreme Court determined needs to be known, which is how many times rocks can be added before downstream water becomes "impaired" under the Clean Water Act. Asking the Science Advisory Board if the synthesis supports the first conclusion (*i.e.,* some rocks come from upstream) doesn't answer the second (how many times can rocks be added downstream before significantly impacting the water's integrity?). EPA is asking entirely the wrong set of policy questions. As GEI puts it,

> "The Science Advisory Board (SAB) charge questions were of such limited scope that they will do little to direct the Synthesis Report toward a more useful exploration of the science needed to inform policy . . . The questions will not provide the SAB panel with needed directive to require substantive revisions to the report such that it . . . inform(s) policy with regard to Clean Water Act jurisdiction."[7]

---

[4] For EPA's synthesis: *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345*.

[5] For GEI's credentials, see: *http://www.geiconsultants.com/about-gei-1*.

[6] For NAR's summary and link to GEI's comments: *http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report*.

[7] For NAR's summary and link to GEI's comments: *http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report*.

There Is No Substitute for Site-Specific Data & Analysis To Determine U.S. Waters

Here's how EPA's synthesis of generic studies stacks up against a more targeted study specific to and based on data for each stream or wetland.

Table 2. EPA Synthesis of Research *Versus* Significant Nexus Analysis

Significant Nexus	Synthesis of Research
Proves that regulation of a stream or wetland will prevent pollution to an ocean, lake or river	Shows *presence* of a connection between streams, wetlands, and downstream, and not *significance*
Shows how much matter/energy can be added to a tributary or wetland before the Act applies	Shows how much of the matter/energy moved from upstream to downstream
Based on site specific data and analysis of soil, plants, hydrology, and other relevant factors	Dependent upon whatever data and analysis academics have used for their connectivity study
Requires an original scientific investigation, data and analysis for each water body to be regulated	Includes no new or original science by agencies; it's a literature review
Relies on timely and water-body-specific facts, data and analysis	Relies on substantially the same body of research which the Supreme Court didn't find compelling

The EPA may not want to "walk the nexus" and collect data on soil, plants and hydrology, but it's forced the Agency to justify their regulatory decisions, according to the staffs' own interviews with the Inspector General: [8]

- "*Rapanos* has raised the bar on establishing jurisdiction."
- ". . . lost one case . . . because no one walked the property."
- ". . . have to assemble a considerable amount of data to prove significant nexus."
- ". . . many streams have no U.S. Geological Survey gauging data."
- ". . . need several years of biotic observations . . . ."
- ". . . there is currently no standard stream flow assessment methodology."
- ". . . biggest impact is out in the arid West, where it is comparably difficult to prove significant nexus."

As a result, many U.S. water determinations (which would not previously have been questioned) are now being reviewed and are not holding up to either EPA or Justice Department scrutiny. Again, from the EPA interviews:

- "Of the 654 jurisdictional determinations [in EPA region 5] . . . 449 were found to be nonjurisdictional."
- "An estimated total of 489 enforcement cases . [were] not pursued . . . case priority was lowered . . . or lack of jurisdiction was asserted as an affirmative defense . . ."
- "In the past, everyone *just assumed* that these areas are jurisdictional" (emphasis added).

"Walking the nexus" may be an administrative inconvenience, but the data don't support an approach based on 'just assuming.' The main reason for the site-specific, data-based analysis is that it provides a sound scientific basis for agency regulatory decisions. Analysis also raises the cost of unjustified U.S. water determinations. It forces the agencies to do what Congress intended, which is to focus on waters which

[8] *Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation,* Report No. 09–N–0149 (April 30, 2009). For a link: *http://www.epa.gov/oig/reports/reportsByTopic/Enforcement_Reports.html*.

are either (a) in fact navigable or (b) significantly impact navigable water. It also prevents agencies from regulating small businesses or homeowners that are not major contributors to navigable water quality impairment.

Proposed Rule Will Overcomplicate Already Complex Real Estate Transactions

Small-business and homeowners are not the problem. Few own enough property to be able to disturb a ½ acre of wetland, which is how the Nationwide 404 Permit Program defines *de minimis* impact to the environment. The typical lot size is a ¼ acre with ¾ having less than an acre.[9] None of the big polluter examples EPA presents involves a homeowner or small business. Yet, by removing the analytical barrier to regulation, agencies will be able to issue more U.S. water determinations on private properties in more places like Arizona, Georgia or wherever else it's now "too time consuming and costly to prove the Clean Water Act protect these rivers," according to the EPA.[10]

The home buying process[11] will not work unless there is sufficient property information to make informed decisions. This is why buyers are provided with good faith estimates and disclosures about material defects and environmental hazards. It is why they are entitled to request a home inspection by a professional before making decisions. It is also why there's such a thing as owner's title insurance. Contracts and legal documents have to be signed to ensure that buyers receive full information and understand it. Later, you can sue if the property isn't as advertised or there are misrepresentations.

*The "**waters of the U.S.**" proposal introduces yet another variable—letters declaring wetlands on private property—into an already complicated home buying process. By removing the analytical requirement before issuing one of these letters, the agencies will make it easier to issue more of them and in more places. The problem is each letter requires the property owner to get a Federal permit in order to make certain improvements to their land. But they don't know which improvements require a permit. Those aren't delineated anywhere in the proposal. If on the other hand, they take their chances and don't initiate a potentially lengthy Federal negotiation as part of a broken permit process, they could face civil fines amounting to tens of thousands of dollars each day and possibly even criminal penalties.*

Also, what's required can vary widely across permits—even within the same district of the Corps. No one will inform you where the goal posts are; just that it's up to you and they'll let you know when you get there. Often, applicants will go through this year-long negotiation only to submit the permit application, find that staff has turned over and they have to start over with a new staffer who has completely different ideas about how to rewrite the permit.

While more U.S. waters letters could be issued under this proposal, the agencies do not provide the detailed information needed for citizens to make informed decisions about these letters. The letter could state for instance: "the parcel is a matrix of streams, wetlands, and uplands" and "when you plan to develop the lot, a more comprehensive delineation would be recommended." Real estate agents will work with sellers to disclose this information, but buyers *won't* know which portion of the lot can be developed, what types of developments are regulated, or how to obtain the permit. They may consult an attorney about this but will most likely be advised to hire an engineer to "delineate" the wetlands without being told what that means. And even if this step is taken, there is no assurance that this analysis will be accepted by the agency or that a permit will ever be issued.

The potential for land-use restrictions and the need for costly permits will increase the cost of home ownership and make regulated properties less attractive to buyers. Of two homes, all else equal (lot size, number of rooms, *etc.*), the one with fewer restrictions should have higher property value.[12]

---

[9] American Housing Survey, 2009.

[10] *http://www2.epa.gov/uswaters*—for the examples, click on "Enforcement of the law has been challenging".

[11] In previous comments, the International Council of Shopping Centers, National Association of Homebuilders, NAR and others have thoroughly documented the commercial and homebuilding impacts of the U.S. waters proposed rule. In this statement, NAR focuses on the impact to existing homeowners which have not been documented.

[12] There is strong empirical data to support this proposition, although economists may disagree. For instance:

- E.L. Glaeser, and B.A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston.* JOURNAL OF URBAN ECONOMICS 65 (2009) 265–278.

Continued

However, before buying, the buyer will want to know in exactly which ways the property could be restricted as well as how much those restrictions could cost (time, effort, money). They will need this information when weighing whether to come to the closing table and deciding how much to ask in reducing listing price in order to compensate for the hassle of a potential Federal negotiation for each unspecified improvement on the property they're considering purchasing.

To illustrate the point, after Congress revised the flood insurance law, many buyers refused to consider floodplain properties not due to the actual insurance cost but because they read in a newspaper about $30,000 flood insurance premiums. Others negotiated reduced sales prices because they feared the property was "grandfathered", and they could potentially see their rates skyrocket, even when, in fact, the home was not grandfathered and the provision of concern had not taken effect and would not for several years. While it may be entirely true that the proposed rule will not cover all homes in a floodplain (only those where a U.S. water is filled) nor regulate such normal home projects as mowing grass and planting flower beds, the takeaway from the flood insurance experience is that buyers make decisions based on fear and uncertainty, both real and *imagined.*

In the case of wetlands, buyers have legitimate reason for concern. Many will have heard the horror story of the Sacketts in Priest Lake, Idaho, who were denied their day in court when they questioned a wetlands determination.[13] Others just south of here in Hampton Roads, Virginia, will read the cautionary tales of buyers suing sellers over lack of wetlands disclosures[14] or neighbor-on-neighbor water wars for mowing grass or planting seedlings.[15] Some might even have a neighbor to two who've been sued over the years for tree removals or grading (*e.g., Catchpole* v. *Wagner*).[16] This all reinforces the need for the EPA and the Corps to provide more information rather than less about the rule, what it does and does not do, and provide as much detail as possible all upfront.

So far the agencies have responded by breaking up the rulemaking process into two parts, and putting forward only the first. This proposal, which clarifies "*waters of the U.S.*," determines "who is regulated." The issue here is whether site-specific data and analysis is required before a wetlands letter is issued. "What is regulated" is not a part of this proposal. Nor does the proposal lay out the full range of home projects that trigger a permit. The wetland permitting process itself is an entirely separate rulemaking. The issue there is what exactly I must do when I get one of these letters and how to appeal it.

Based on a report by the Environmental Law Institute (ELI),[17] that permitting process is broken and needs reform and streamlining to provide some consistency, timeliness, and predictability. But any comments or suggestions about this have been deemed non-germane and will not be considered by the agencies in the context of a "*waters of the U.S.*" proposal. Because the agencies have decided to play a regulatory shell game with the "who" *vs.* the "what," property owners have been put in an untenable position of commenting on a regulation without knowing its full impact. Those who own a small business will be denied the opportunity under another law to offer significant alternatives that could clarify or minimize the proposed "waters of U.S." impact while still achieving the Clean Water Act's objectives.[18]

These are some property buyer questions which are not answered by the immediate proposed rule:

- What is the full range of projects that will require a Federal permit?
- What can I do on my property without first having to get a permit?
- What do I have to do to get one of these permits?
- What's involved in the Federal application process?
- What information do I have to provide and when?
- How long will the permit application take?
- How will my project and application be evaluated?
- What are the yardsticks for avoiding or minimizing wetlands loss?

• K.R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices.* JOURNAL OF URBAN ECONOMICS 61 (2007) 420–435.

[13] For the chilling facts of case, see: *http://www.pacificlegal.org/Sackett*.

[14] *http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you*.

[15] *http://hamptonroads.com/2012/05/newport-news-gets-swamped-wetlands-dispute*.

[16] 210 U.S. Dist LEXIS 53729, at *1 (W.D. Wash. 2010).

[17] *http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience*.

[18] For EPA's justification against conducting a small business review panel under the Regulatory Flexibility Act, see: 79 *Fed. Reg.* 22220 (April 21, 2014).

- What are the full set of permit requirements and conditions?
- Are there changes I can make in advance to my project and increase my chances of approval?
- Can I be forced to redesign my home project?
- What kinds of redesigns could be considered?
- What if I disagree with the agency's decision, can I appeal?
- What exactly is involved in that appeal?
- What do I have to prove in order to win?
- Will I need an attorney? An engineer? Who do I consult?
- And how much will all this cost me (time, efforts, money)?

The "*Waters of the U.S.*" proposal creates these uncertainties into the property buying process.

Uncertainty No. 1: The "*waters of the U.S.*" proposal does not tell me what I can and cannot do on my own property without a Federal permit.

Not all property owners in the floodplain will be regulated, only those who conduct regulated activities. Again, that information is not found in the "*waters of the U.S.*" proposal, and there is not much more in the decision documents from the previous regulation for the "nationwide" (general) permit program (2012). The general permit for commercial real estate (No. 39) is separate from residential (No. 29), but both include a similarly vague and über-general statement about what's regulated:

> "Discharges of dredged or fill material into non-tidal *waters of the United States* for the *construction or expansion of a single residence,* a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features *may include but are not limited to roads, parking lots, garages, yards,* utility lines, stormwater management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development)." [19]

However, construction projects are not the only ones that may require a permit. For example, home owners have been sued for not obtaining one to perform these activities:

- Landscaping a backyard (*Remington* v. *Matheson* [neighbor on neighbor]).
- Use of an "outdated" septic system (*Grine* v. *Coombs*).
- Grooming a private beach (*U.S.* v. *Marion L. Kincaid Trust*).
- Building a dam in a creek (*U.S.* v. *Brink*).
- Cleaning up debris and tires (*U.S.* v. Fabian).
- Building a fruit stand (*U.S.* v. *Donovan*).[20]
- Stabilizing a river bank (*U.S.* v. *Lambert*).
- Removing small saplings and grading the deeded access easement (*Catchpole* v. *Wagner*).[21]

Also, the proposal includes exemptions for specific activities performed by farmers and ranchers, but not homeowners or small businesses. The agencies would not have exempted these activities from permits unless they believed these activities could trigger them. Yet, none of these "normal farming" practices appear to be uniquely agricultural, opening up the non-farmers to regulation. Here are a couple of the listed exemptions but the full set can be found on EPA's website.[22]

- Fencing (USDA practice No. 383).
- Brush removal (No. 314).

---

[19] *http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_29_2012.pdf.*

[20] Note: The defendant lost because he couldn't finance an expert witness to refute the Corps' wetlands determination; under this proposed rule, the Corps would no longer have to provide any data and analysis at all to support its future determinations; the burden would be entirely on the property owner to come up with that data and analysis on their own.

[21] There is an extended history between Catchpole and Wagner over activity on this easement, and the Corps has been repeatedly drawn into the dispute. In one instance the Sheriff was called, and the Corps had to step in and referee that "normal mowing activity" was not a violation that the Corps would pursue under the Clean Water Act. NAR would expect more of these kinds of disputes to arise, should the proposed rule be finalized.

[22] *http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf.*

- Weed removal (No. 315).
- Stream crossing (No. 578).
- Mulching (No. 484).
- Tree/Shrub Planting (No. 422).
- Tree Pruning No. 666).

While the proposal could open up more properties to wetlands letters, permits and lawsuits, it does not in any way limit who can sue over which kinds of activities for lack of permits. It does, on the other hand, reduce the amount of data and analysis the Corps or EPA need in order to declare U.S. waters on these properties, and shifts the entire burden to the property owner to prove one these waters do not exist on their property before they can win or get a frivolous case dismissed.

Uncertainty No. 2: The proposal doesn't tell me how to get a permit, what's required and how long it will take.

Again, the permitting process is not a part of the '*waters of the U.S.*' proposal, denying home owners and small businesses an opportunity to comment on the proposed rule's full impact or offer reasonable alternatives that could minimize the impact while protecting navigable and significant nexus waters. EPA's economic analysis on page 16 does provide an estimate of the average cost for a general permit ($13,000 each).

Costs go up from there. The estimate of $13,000 is only for a general permit and for the application alone; it doesn't include re-designing a project to obtain permit approval or the conditions and requirements which can vary widely across permits. While not providing an estimate of the time it takes to get one of these permit, U.C. Berkeley Professor David Sunding found based on a survey that the "[general] permits in our sample took an average of 313 days to obtain."[23] Individual permits can take even longer and be significantly more expensive.

The reason that general permits have the lowest price tag is because they are intended to reduce the amount of paper work and time to start *minor* home construction projects that "result in minimal adverse environmental effects, individually or cumulatively." One of the conditions for the permit is a project may not disturb more than a ½ acre of wetlands or 300 linear feet of streambed, the Corp's definition of *de minimis.* However, transaction costs and requirements may vary.

The Environmental Law Institute studied the process, and found very little consistency, predictability or timeliness across permits.[24] The process begins with a letter from the agency declaring U.S. water on the property. Home owners may be given a copy of the law, told to submit any "plans to develop the lot", and be reminded that the burden of proof is entirely on them. No examples of how to comply are offered. There might be a check list (which is widely frowned upon) but there is no single definition or yard stick or practical guidance of any sort for the key compliance terms "avoidance," "minimization" and "practicable."

If you ask "which part of my property can I develop?", the answer is "hire an engineer and delineate it." "What if I make these changes to my project before applying?", the answer may be "I'll know it when we see it." There is no standard approach that the Corps follows to evaluate the project. According to the ELI's interviews, it is common for applicants to go through an entire negotiation and upon submitting an application, find staff turned over and the new individual has a completely different concept of what's most important to avoid and the best way to minimize.

The following are more actual quotes by regulators documented in the ELI report:

- "The question is, how much is enough? It's all judgment. It depends on the person's mood and is extremely variable."
- "We ask them to document plans and show how they get to where they are. If I think you can do more, I'm going to show you. The burden is on the applicant to show me where they've been in the journey."
- "I like to be a rule maker with regard to work I've done, but the more I standardize, the more I restrict myself with regard to find possible solutions."
- "[B]ecause judgments on which impacts are more avoidable or more important exists in a grey area, a lot of the decision making within the Corps depends on professional judgment, causing a lot of variability."
- "There are times when the agency will pressure the applicant to do more avoidance or minimization during the permitting process."

---

[23] *http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf.*

[24] For ELI's report, *http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience.*

- "There are times when they won't sign off because they want a certain thing. That's the subjective aspect and I think that is the way it ought to work."

Permit decisions appear completely subjective, iterative and not uniform across individual applicants. It seems that whatever the agency assumes is necessary to avoid or minimize wetlands loss, goes. If you refuse to provide a single piece of information or don't go along 100% with a proposed design modification, your permit is summarily denied. In at least one example (*Schmidt* v. *the Corps*), the agency denied the permit to build a single family home on a lot in part because the Corps identified other lots the land owner owned and his neighbors didn't seem to be objecting to construction on those lots (yet).

For these reasons, the ELI recommended several reforms to the wetlands permit process, including developing guidelines identifying common approaches and quantifiable standards. But at this time, the agencies don't appear interested in sensible recommendations like these, even if it brings some consistency, certainty or reduces the burden on small business or homeowners while still protecting the environment. "Nationwide permits do not assert jurisdiction over waters and wetlands . . . Likewise, identifying navigable waters . . . is a different process than the NWP authorization process," according to the Corps.[25]

Uncertainty No. 3: The proposal doesn't tell me what to do if I disagree with an agency decision, or how to prove the Clean Water Act does not apply to my property.

The proposal asserts jurisdiction over any U.S. water or wetland with more than a "speculative or insubstantial" impact on navigable water. Yet, nowhere does this proposal define those terms or a process for how a homeowner may appeal a U.S. water determination based on "insubstantial or speculative" impacts.

The proposal will eliminate the need for agencies to collect data and perform analysis to justify regulation for most water bodies. Before, it was up to the agencies to prove the Clean Water Act applies, but under this proposal, the burden would shift 100% to the property owners to prove the reverse. And the cost will be higher for property owners because (1) they don't have the expertise needed, (2) there is no guidance for delineating "insubstantial/speculative" impacts, and (3) they have not been learning-by-doing these analyses as the agencies have for decades.

Ironically, the rationale for the proposed rule is these agencies cannot justify the taxpayer expense of site specific data and analysis, yet the proposal is forcing individual taxpayers to hire an engineer and pay for the very same analysis themselves or else go through a broken permit process.

Administrative inconvenience is not a good excuse. If it's too hard for the Federal Government to do some site visits, data collection and analysis in order to justify their regulations, then perhaps it's simply not worth doing.

Conclusion

Based on the forgoing, NAR respectfully requests that Congress step in and stop these agencies from moving forward with a proposed rule that removes the scientific basis for "waters of U.S." regulatory decisions. It does not provide certainty to taxpayers who own the impacted properties and will complicate property and home sales upon which the economy depends.

Thank you for the opportunity to submit these comments. NAR looks forward to working with Committee Members and the rest of Congress to find workable solutions that protect navigable water quality while minimizing unnecessary cost and uncertainty for the nation's property owners and buyers.

○

[25] 77 *Fed. Reg.* 10190 (Feb. 21, 2012).